TABLE 1.—REPRESENTATIVE AVERAGE UNIT COSTS OF ENERGY FOR FIVE RESIDENTIAL ENERGY SOURCES (1993)

Type of energy	In common terms	As required by DOE test procedure	Dollars per million Btu [1]
Electricity	8.30¢/kWh [2,3]	$0.0830/kWh	$24.33
Natural Gas	59.46¢/therm [4] or $6.13/MCF [5,6]	$0.00000595/Btu	5.95
No. 2 heating oil	$1.00/gallon [7]	$0.00000721/Btu	7.21
Propane	$0.73/gallon [8]	$0.00000799/Btu	7.99
Kerosene	$0.82/gallon [9]	$0.00000607/Btu	6.07

[1] Btu stands for British thermal unit.
[2] kWh stands for kilowatt hour.
[3] 1 kWh=3,412 Btu.
[4] 1 therm=100,000 Btu. Natural gas prices include taxes.
[5] MCF stands for 1,000 cubic feet.
[6] For the purposes of this table, 1 cubic foot of natural gas has an energy equivalence of 1,031 Btu.
[7] For the purposes of this table, 1 gallon of No. 2 heating oil has an energy equivalence of 136,690 Btu.
[8] For the purposes of this table, 1 gallon of liquid propane has an energy equivalence of 91,333 Btu.
[9] For the purposes of this table, 1 gallon of kerosene has an energy equivalence of 135,000 Btu.

* * * * *

Donald S. Clark,

Secretary.

[FR Doc. 93–1736 Filed 1–22–93; 8:45 am]

BILLING CODE 6750–01–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[T.D. 8472]

RIN 1545–AL35

Certain Corporate Distributions to Foreign Corporations Under Section 367(e)

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final Income Tax Regulations relating to the distribution of stock and securities under section 355 and section 367(e)(1) of the Internal Revenue Code of 1986 by a domestic corporation to a person who is not a United States person. These regulations are necessary to implement section 367(e)(1) as added by the Tax Reform Act of 1986. The regulations affect the taxability of the corporation making the distribution.

DATES: These regulations are effective January 16, 1993.

FOR FURTHER INFORMATION CONTACT: Leslie A. Cracraft or Willard W. Yates of the Office of Associate Chief Counsel (International), Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224 ((202) 622–3850 (Yates) or (202) 622–3860 (Cracraft)) (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)) under control number 1545–1124. The estimated annual burden per respondent varies from 2 hours to 10 hours, depending on individual circumstances, with an estimated average of 8 hours.

These estimates are an approximation of the average time expected to be necessary for collection of information. They are based on such information as is available to the Internal Revenue Service. Individual respondents may require greater or less time, depending on their particular circumstances.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, T:FP, Washington, DC 20224, and to the Office of Management and Budget, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Background

On January 16, 1990, temporary regulations § 1.367(e)-1T were adopted (as part of T.D. 8280) [1990–1 C.B. 80] and published in the **Federal Register** at 55 FR 1406. A cross-referenced Notice of Proposed Rulemaking for § 1.367(e)–1 was published on that same date at 55 FR 1472. These amendments, in part, were proposed to implement section 367(e)(1) of the Internal Revenue Code of 1986, as revised by sections 631(d)(1) and 1810(g) of the Tax Reform Act of 1986 (100 Stat. 2085, 2272, Pub. L. 99–514). The regulations were issued under the authority contained in section 367(e)(1) and section 7805(a).

Written comments responding to the notice were received. There were no requests for a public hearing. After consideration of all written comments relating to 1.367(e)–1, this section of the proposed regulations is adopted as revised by this Treasury decision.

Need for Immediate Effective Date for Final Regulations

The regulations under section 367(e)(1) will apply to the subject outbound distributions occurring on or after January 16, 1993. These regulations will clarify and simplify the law and provide taxpayers with immediate guidance needed to effectuate outbound distributions and will resolve uncertainty as to the tax consequences and reporting obligations with respect to such transactions. This effective date is also necessary to prevent avoidance of tax and to provide regulatory relief in certain instances. Accordingly, these regulations are not subject to the effective date limitation of 5 U.S.C. 553(d).

Explanation of Provisions

In General

The final regulations provide rules concerning the recognition of gain by a domestic corporation on a distribution that qualifies for nonrecognition under section 355 of stock or securities of a domestic or foreign corporation to a person who is not a United States person. The regulations provide, as a general rule, that gain recognition is required on such a distribution. However, the final regulations follow the proposed regulations, with certain modifications, in providing three exceptions to this rule in the case of distributions of stock or securities of domestic controlled corporations: The U.S. real property holding corporation exception, the publicly traded exception, and the 5-year gain recognition agreement exception.

In response to the proposed regulations, one commentator proposed that an exception to the general gain recognition rule be provided in cases where the foreign distributee agrees to subject to U.S. tax any gain realized on

a disposition of the stock or securities of the distributing or controlled corporation within a 5 year period following the distribution. Such an exception was not included in the final regulations because of concerns about the administrative difficulties and complexities of collecting a shareholder-level tax, as well as concerns about the inconsistency of such an approach with the general principles of section 367. However, the Service intends to continue to study this alternative and solicits taxpayer comments on the proposal, including suggestions on how to administer such an election.

Some commentators suggested that the exceptions to the general gain recognition rule be made applicable to distributions of stock or securities of foreign corporations. This suggestion was not adopted in the final regulations because the distribution of stock of a foreign corporation in a section 355 transaction will generally result in a complete loss of U.S. corporate taxing jurisdiction over the stock of the foreign corporation and its assets.

Distributions to Partnerships, Trusts and Estates

Both foreign and domestic persons often hold interests in domestic corporations through pass-through entities. Accordingly, the final regulations apply aggregate principles to stock owned by a domestic or foreign partnership, trust or estate. The regulations generally apply the constructive ownership principles of section 318 in determining the ownership of stock or securities of the distributing or controlled corporation owned by a partnership, trust or estate (whether foreign or domestic). Thus, if under section 355 a domestic corporation distributes stock of a controlled corporation to a partnership that is owned by two equal partners, one domestic and one foreign, the distributing corporation must recognize gain under section 367(e)(1) with respect to one-half of the stock distributed to the partnership. The Service is studying the determination of a beneficiary's actuarial interest in a trust, and may issue further guidance on this subject at a future date.

The final regulations generally do not permit a distributing corporation to qualify for nonrecognition under the 5-year gain recognition agreement exception on a distribution to a pass-through entity with respect to foreign persons holding interests in the pass-through entity. The Service is concerned that allowing foreign persons holding interests in pass-through entities to qualify for the exception would excessively complicate the exception and impose an undue administrative burden on the Service. The Service, however, recognizes that the denial of the exception to foreign persons holding interests in pass-through entities may be unduly harsh in certain circumstances. Therefore, the regulations permit a distributing corporation to obtain a ruling from the Service applying the exception to foreign persons holding interests in pass-through entities, and intends to publish a revenue procedure describing the conditions for obtaining such a ruling.

Anti-Abuse Rule

The final regulations provide an anti-abuse rule to address situations in which a domestic corporation is formed or availed of by one or more foreign persons to hold the stock of a distributing corporation for a principal purpose of avoiding the requirements of section 367(e)(1) and these regulations. If the rule applies, the distribution will be treated as having been made to the foreign persons, who will then be treated as having transferred the distributed stock (and distributing stock, as the case may be) to the domestic corportion. If gain recognition on the distribution, as resequenced, can be avoided by filing a 5-year gain recognition agreement, gain recognition will not be required if the subsequent transfer to the domestic corporation qualifies under the successor-in-interest rules described below.

U.S. Real Property Holding Corporation Exception

The final regulations include the exception contained in the proposed regulations applicable to a distribution of the stock of a U.S. real property holding corporation by a corporation that continues to be a U.S. real property holding corporation after the distribution. Some commentators suggested that this exception be revised to provide for nonrecognition on any distribution of the stock of a U.S. real property holding corporation, even if the distributing corporation no longer qualifies as a U.S. real property holding corporation after the distribution. This approach was not adopted because the exception is premised on continuing U.S. taxing jurisdiction over shareholder-level gain on the stock of both the distributing and controlled corporation. Such a distribution could qualify for one of the other exceptions to the general gain recognition rule (assuming the requirements of the exception are satisfied).

Publicly Traded Exception

The final regulations revise the publicly traded exception contained in the proposed regulations. The final regulations retain the requirement for nonrecognition on a distribution of stock or securities of a domestic controlled corporation that more than 80 percent of the stock (measured by value) of the controlled corporation be distributed with respect to one or more publicly traded classes of stock of the distributing corporation. The final regulations, however, eliminate the requirement in the proposed regulations that 80 percent or more of the stock of the distributing corporation be publicly traded.

The final regulations also provide that a distributing corporation may obtain nonrecognition on the distribution of stock of a domestic controlled corporation to more-than-five-percent foreign shareholders of a publicly traded corporation under the U.S. real property holding corporation exception or the 5-year gain recognition agreement exception if all of the requirements of the relevant exception are satisfied. These exceptions may also apply to the distribution to non-publicly traded classes of stock of a publicly traded corporation.

5-Year Gain Recognition Agreement Exception

The final regulations liberalize and simplify the 5-year gain recognition agreement exception contained in the proposed regulations. In general, no gain is immediately recognized on the distribution of stock or securities of a domestic controlled corporation to a foreign distributee if the distributing corporation agrees to file an amended return and recognize such gain upon a disposition by the foreign distributee of the stock or securities of the distributing or controlled corporation within 60 months after the end of the taxable year of the distributing corporation in which the distribution was made. The foreign distributee must make annual certifications concerning its ownership of the stock during the 60-month period.

Under the proposed regulations, this exception applied only if the distributing corporation was wholly-owned by five or fewer individual or corporate shareholders. The final regulations permit this exception to be claimed for a distribution to 10 or fewer foreign distributees, regardless of the number of shareholders of the corporation. The requirement that the foreign distributees be individuals or corporations generally has been retained because of the administrative

difficulties of applying this exception to other types of taxpayers. Thus, except where the distributing corporation obtains a ruling from the Service to the contrary, distributions to partnerships, trusts or estates with foreign interest holders do not qualify for nonrecognition under this exception.

Under the proposed regulations, this exception applied only if, immediately before the distribution, at least 90 percent of the stock of the distributing corporation had a holding period of at least two years in the hands of the shareholders. In light of the enactment of section 355(d), this requirement has not been included in the final regulations.

Under the proposed regulations, to qualify for the exception in the case of a distribution to a foreign corporation, the fair market value of the stock of the distributing corporation owned by the foreign corporation immediately before the distribution could not equal or exceed 50 percent of the fair market value of all of the foreign corporation's stock immediately before the distribution. This anti-holding company provision has been replaced in the final regulations with a requirement that the foreign corporate distributee be engaged in the active conduct of a trade or business (determined without regard to the trade or business conducted by the distributing or controlled corporation) until the end of the 60-month period following the taxable year of the distribution. The determination of whether the distributee is engaged in an active trade or business generally is made in accordance with the provisions of section 355(b)(2)(A).

In the case of a distribution of stock or securities of a controlled corporation that is not part of the distributing corporation's consolidated return group, the final regulations retain the rule in the proposed regulations that, immediately after the distribution, the stock of the distributing corporation must have a fair market value at least equal to the fair market value of the distributed stock and securities of the controlled corporation. The fair market value requirement ensures that the distributing corporation retains sufficient assets to meet potential tax liabilities if gain is subsequently recognized under the 5-year gain recognition agreement. However, the final regulations provide that, if a controlled corporation is part of the distributing corporation's consolidated return group for one or more taxable years in which all of the stock and securities of the controlled corporation are distributed, and thus is severally liable for any tax on gain recognized on the distribution, the fair market value requirement does not apply.

The proposed regulations provided that, if a foreign distributee disposed of any of the stock or securities of the distributing or controlled corporation within the 60-month period covered by the gain recognition agreement, the entire amount of gain realized by the distributing corporation on the distribution to the foreign distributee would be recognized. The final regulations provide that only a proportionate amount of gain is recognized, determined by reference to the portion of stock and securities of the distributing corporation and controlled corporation disposed of by the foreign distributee.

The final regulations permit the stock or securities of the distributing or controlled corporation to be disposed of by the foreign distributee in certain nonrecognition transactions without causing gain to be recognized under the gain recognition agreement. The rules have been designed to provide taxpayers with flexibility to restructure their operations, without imposing undue administrative burdens on the Service. The Service solicits taxpayer comments on the scope of these rules.

The final regulations follow the proposed regulations in providing that the distributing corporation must amend its income tax return for the year of the distribution in the event gain is required to be recognized. Interest must be paid on any additional tax incurred.

Regulations Under Section 367(e)(2)

The temporary regulations under section 367(e)(2) that were proposed with the regulations under section 367(e)(1) will be promulgated as final regulations in a separate Treasury decision. The final regulations under section 367(e)(2) will be effective with respect to distributions occurring on or after January 16, 1993. However, taxpayers will be given the option to apply the provisions of the current temporary regulations to distributions occurring on or after January 16, 1993 but prior to the date that is 30 days after the date on which the final section 367(e)(2) regulations are published in the **Federal Register.**

Effective Date

These regulations are effective with respect to distributions occurring on or after January 16, 1993. However, a corporation may elect to apply the regulations (subject to certain elective exceptions) to all distributions made by it after February 15, 1990 (the date the temporary regulations under section 367(e)(1) became effective), to which this section applies by timely filing an original or amended return for the year of distribution and otherwise complying with these regulations.

Special Analyses

It has been determined that these regulations are not major rules as defined in Executive Order 12291. Therefore, a final Regulatory Impact Analysis is not required. It has also been determined that a prior notice of proposed rulemaking was required by the Administrative Procedure Act. It is hereby certified that these rules will not have a significant impact on a substantial number of small entities. Few small entities would be affected by these regulations. A Regulatory Flexibility Analysis, therefore, is not required under section 604 of the Regulatory Flexibility Act (5 U.S.C. chapter 6). Pursuant to section 7805(f) of the Internal Revenue Code, a copy of the notice of proposed rulemaking was submitted to the Administrator of the Small Business Administration for comment on their impact on small business.

Drafting Information

Various personnel from the Office of the Associate Chief Counsel (International), Internal Revenue Service, other offices of the Internal Revenue Service and the Treasury Department participated in developing these regulations.

List of Subjects

26 CFR 1.361–1 Through 1.367(e)–2T

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 602 are amended as follows:

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Paragraph 1. The authority citation for part 1 is amended by adding a citation to read as follows:

Authority: 26 U.S.C. 7805 * * *
§ 1.367(e)–1 also issued under 26 U.S.C. 367 (e). * * *

Par. 2. Sections 1.367(e)–0T and 1.367(e)–1T are removed as of January 16, 1993.

Par. 3. Sections 1.367(e)–0 and 1.367(e)–1 are added to read as follows:

§ 1.367(e)–0 Treatment of distributions or liquidations under section 367(e); table of contents.

This section lists captioned paragraphs contained in § 1.367(e)–1.

§ 1.367(e)–1 Distributions described in section 367(e)(1)

1.367(e)–1 Distributions described in section 367(e)(1).

(a) *Purpose and scope.* This section provides rules concerning the recognition of gain by a domestic corporation on a distribution that qualifies for nonrecognition under section 355 of stock or securities of a domestic or foreign corporation to a person who is not a United States person. Paragraph (b) of this section states as a general rule that gain recognition is required on the distribution. Paragraph (c) of this section provides exceptions to the gain recognition rule of paragraph (b) of this section for certain distributions of stock or securities of a domestic corporation. Paragraph (d) of this section refers to other consequences of distributions described in this section. Paragraph (e) of this section provides examples of the rules of paragraphs (b), (c) and (d) of this section. Finally, paragraph (f) of this section specifies the effective date of this section.

(b) *Recognition of gain required*—(1) *In general.* If a domestic corporation (distributing corporation) makes a distribution that qualifies for nonrecognition under section 355 of stock or securities of a domestic or foreign corporation (controlled corporation) to a person who is not a United States person, as defined in section 367(a) and the regulations thereunder (foreign distributee), then, except as provided in paragraph (c) of this section, the distributing corporation shall recognize gain (but not loss) on the distribution under section 367(e)(1).

(2) *Computation of gain of the distributing corporation.* The gain recognized by the distributing corporation under paragraph (b)(1) of this section shall be equal to the excess of the fair market value of the stock or securities distributed to the foreign distributee (determined as of the time of the distribution) over the distributing corporation's adjusted basis in the stock or securities distributed to the foreign distributee. For purposes of the preceding sentence, the distributing corporation's adjusted basis in each unit of each class of stock or securities distributed to a foreign distributee shall be equal to the distributing corporation's total adjusted basis in all of the units of the respective class of stock or securities owned immediately before the distribution, divided by the total number of units of the class of stock or securities owned immediately before the distribution.

(3) *Treatment of the distributee.* If the distribution otherwise qualifies for nonrecognition under section 355, each distributee shall be considered to have received stock or securities in a distribution qualifying for nonrecognition under section 355, even though the distributing corporation recognizes gain on the distribution. Thus, the distributee shall not be considered to have received a distribution described in section 301 or a distribution in an exchange described in section 302(b) upon the receipt of the stock or securities of the controlled corporation.

(4) *Nonapplication of section 367(a) principles that provide for exceptions to gain recognition.* Paragraph (b)(1) of this section requires recognition of gain notwithstanding the application of any principles contained in section 367(a) or the regulations thereunder. The only exceptions to paragraph (b)(1) of this section are contained in paragraph (c) of this section. None of these exceptions applies to a distribution of stock or securities of a foreign corporation.

(5) *Partnerships, trusts and estates*—(i) *In general.* For purposes of this section, stock or securities owned by or for a partnership (whether foreign or domestic) shall be considered to be owned proportionately by its partners. In applying this principle, the proportionate share of the stock or securities of the distributing corporation considered to be owned by a partner of a partnership at the time of the distribution shall equal the partner's distributive share of gain that would be realized by the partnership from a sale of the stock of the distributing corporation immediately before the distribution (without regard to whether, under the particular facts, any gain would actually be realized on the sale for U.S. tax purposes), determined under the rules and principles of sections 701 through 761 and the regulations thereunder. For purposes of this section, stock or securities owned by or for a trust or estate (whether foreign or domestic) shall be considered to be owned proportionately by the persons who would be treated as owning such stock or securities under sections 318(a)(2)(A) and 318(a)(2)(B). In applying section 318(a)(2)(B), if a trust includes interests that are not actuarially ascertainable and a principal purpose of the inclusion of the interests is the avoidance of section 367(e)(1), all such interests shall be considered to be owned by foreign persons. In a case where an interest holder in a partnership, trust or estate that owns stock of the distributing corporation is itself a partnership, trust or estate, the rules of this paragraph (b)(5) apply to individuals or corporations that own (direct or indirect) interests in the upper-tier partnership, trust or estate.

(ii) *Written statement.* If prior to the date on which the distributing corporation must file its income tax return for the year of the distribution, the corporation obtains a written statement, signed under penalties of perjury by an interest holder in a partnership, trust, or estate, that certifies that the interest holder is a United States person who is an individual or corporation, no liability shall be imposed under paragraph (b)(1) of this section with respect to the distribution to the interest holder, unless the distributing corporation knows or has reason to know that the statement is false. The written statement must set forth the amount of the interest holder's proportionate interest in the distributing corporation, as well as the interest holder's name, taxpayer identification number, home address (in the case of an individual) or office address and place of incorporation (in the case of a corporation). The written statement

must be retained by the distributing corporation with its books and records for a period of three calendar years following the close of the last calendar year in which the corporation relied upon the statement. If the distributing corporation instead relies upon other evidence of the interest holder's status as a United States person or of the amount of the interest holder's proportionate interest, liability shall be imposed under paragraph (b)(1) of this section if the interest holder, in fact, is not a United States person or the amount of its proportionate interest is not established.

(6) *Anti-abuse rule.* If a domestic corporation is directly or indirectly formed or availed of by one or more foreign persons to hold the stock of a second domestic corporation for a principal purpose of avoiding the application of section 367(e)(1) and the requirements of this section, any distribution of stock or securities to which section 355 applies by such second domestic corporation shall be treated for federal income tax purposes as a distribution to such foreign person or persons, followed by a tranfer of the stock or securities to the domestic corporation. The qualification of the distribution to the foreign person for an exception to the general gain recognition rule of paragraph (b)(1) of this section, and the consequences of the transfer to the domestic corporation under this section, shall be determined in accordance with all of the facts and circumstances.

(c) *Nonrecognition of gain*—(1) *Distribution by a U.S. real property holding corporation of stock in a second U.S. real property holding corporation.* Gain shall not be recognized under paragraph (b) of this section by a domestic corporation making a distribution that qualifies for nonrecognition under section 355 of stock or securities of a domestic controlled corporation to a foreign distributee if, immediately after the distribution, both the distributing and controlled corporations are U.S. real property holding corporations (as defined in section 897(c)(2)). For the treatment of the distribution under section 897, see section 897(e)(1) and the regulations thereunder.

(2) *Distribution by a publicly traded corporation*—(i) *Conditions for nonrecognition.* Gain shall not be recognized under paragraph (b) of this section by a domestic corporation making a distribution that qualifies for nonrecognition under section 355 of stock or securities of a domestic controlled corporation to a foreign distributee if both of the following conditions are satisfied:

(A) Stock of the domestic controlled corporation with a value of more than 80 percent of the outstanding stock of the corporation is distributed with respect to one or more classes of the outstanding stock of the distributing corporation that are regularly traded on an established securities market, as defined in § 1.897–1(m) (1) and (3), located in the United States. Stock is considered to be regularly traded if it is regularly quoted by brokers or dealers making a market in such interests. A broker or dealer is considered to make a market only if the broker or dealer holds himself out to buy or sell interests in the stock at the quoted price.

(B) At the time of the distribution, the distributing corporation does not know or have reason to know that the subject foreign distributee owns, directly or constructively, more than 5 percent (by value) of a class of stock of the distributing corporation with respect to which the stock of the controlled corporation is distributed. For purposes of determining whether a foreign distributee owns, directly or constructively, more than 5 percent (by value) of a class of stock of the distributing corporation, the rules of section 897(c)(3) and the regulations thereunder shall apply, except as otherwise provided herein.

(ii) *Relation to other nonrecognition provisions.* If the distribution of the stock and securities of the controlled corporation also qualifies for nonrecognition under paragraph (c)(1) of this section, the distributing corporation shall be entitled to nonrecognition under paragraph (c)(1) of this section and not this paragraph (c)(2). The distributing corporation may obtain nonrecognition treatment under paragraph (c)(1) or (c)(3) of this section with respect to a foreign distributee that owns more than 5 percent of a class of stock of the distributing corporation, if all of the requirements of either of those paragraphs is satisfied.

(3) *Distribution of certain domestic stock to 10 or fewer foreign distributees*—(i) *In general.* Gain shall not be recognized under paragraph (b) of this section by a domestic corporation making a distribution that qualifies for nonrecognition under section 355 of stock or securities of a domestic controlled corporation to a foreign distributee if each of the conditions of this paragraph (c)(3) is satisfied.

(ii) *Conditions for nonrecognition.* A distribution of stock or securities described in paragraph (c)(3)(i) of this section to a foreign distributee shall not result in the recognition of gain if each of the following conditions is satisfied:

(A)(*1*) There are 10 or fewer foreign distributees for which nonrecognition is claimed under this paragraph (c)(3), each of whom is either an individual or a corporation as defined in section 7701(a)(3) of the Internal Revenue Code.

(*2*) Unless the distributing corporation obtains a ruling from the Internal Revenue Service to the contrary, no foreign distributee shall be entitled to claim nonrecognition under this paragraph (c)(3) if it holds its interest in the distributing corporation through a partnership, trust or estate (whether foreign or domestic).

(*3*) If the distribution is made to more than 10 foreign distributees, the distributing corporation shall designate the 10 or fewer foreign distributees for which nonrecognition is claimed under this paragraph (c)(3).

(B) If the distributee for which nonrecognition is claimed under this paragraph (c)(3) is a foreign corporation, immediately after the distribution and at all times until the close of the 60-month period following the end of the taxable year of the distributing corporation in which the distribution was made, the foreign distributee is directly or indirectly engaged in the active conduct of a trade or business. To determine what constitutes an active conduct of a trade or business, see section 355(b)(2)(A) and the regulations thereunder. For purposes of this paragraph (c)(3)(ii)(B), a foreign distributee shall be considered to engage in the active conduct of a trade or business if it directly conducts the trade or business or if any corporation, 80% of the stock (measured by vote and value of which it directly or indirectly owns, conducts the trade, or business. However, for purposes of this paragraph (c)(3)(ii)(B), a foreign distributee will not be considered to engage in the active conduct of any trade or business engaged in, directly or indirectly, by the distributing corporation or controlled corporation. The requirements of this paragraph (c)(3)(ii)(B) will not be satisfied if, at any time until the close of the 60-month period following the end of the taxable year of the distributing corporation in which the distribution was made, the foreign distributee directly or indirectly engages in the active conduct of one or more trades or businesses that have a fair market value that is not substantial in relation to the fair market value of the stock of the foreign distributee for a principal purpose of complying with the requirements of this paragraph (c)(3).

(C)(*1*) Immediately after the distribution, the stock of the distributing

corporation has a fair market value that is at least equal to the fair market value of the distributed stock and securities of the controlled corporation immediately before the distribution.

(2) The requirements of paragraph (c)(3)(ii)(C)(1) of this section shall not apply if the distributing corporation distributes all of the stock and securities of the controlled corporation during one or more taxable years with respect to which the controlled corporation is severally liable under § 1.1502–6(a) for tax imposed on any gain required to be recognized by the distributing corporation pursuant to this paragraph (c)(3).

(D) Immediately after the distribution and at all times until the close of the 60-month period following the end of the taxable year of the distributing corporation in which the distribution was made, the foreign distributee is a resident of (if the foreign distrubutee is an individual), or is incorporated in (if the foreign distributee is a corporation), a foreign country that maintains a comprehensive income tax treaty with the United States that contains an information exchange provision to which the foreign distributee is subject. This requirement is satisfied during any period in which an individual foreign distributee is a resident of the United States.

(E) At all times until the close of the 60-month period following the end of the taxable year of the distributing corporation in which the distribution was made, the foreign distributee continues to own all of the stock and securities of the distributing and controlled corporations that the foreign distributee owned immediately after the distribution (including any stock and securities of the distributing or controlled corporation later acquired from the distributing or controlled corporation for which the distributee has a holding period determined under section 1223 by reference to such stock and securities).

(F) The distribution of stock or securities described in paragraph (c)(3)(i) of this section is not a distribution pursuant to which the distributing corporation goes out of existence.

(G) The distributing corporation files the agreement to recognize gain described in paragraph (c)(3)(iii) of this section with its income tax return for its taxable year in which the distribution is made. In addition, for each of the taxable years of the distributing corporation, beginning with the taxable year of the distribution and ending with the taxable year that includes the close of the 60-month period following the end of the taxable year of the distributing corporation in which the distribution was made, the distributing corporation files with its income tax return the annual certifications described in paragraph (c)(3)(v) of this section.

(H) For each of the taxable years of the distributing corporation, beginning with the taxable year of the distribution and ending with the taxable year that includes the close of the 60-month period following the end of the taxable year of the distributing corporation in which the distribution was made, the foreign distributees for which nonrecognition is claimed under this paragraph (c)(3) provide to the distributing corporation the annual certifications described in paragraph (c)(3)(v) of this section.

(iii) *Agreement to recognize gain.* The agreement to recognize gain required by this paragraph (c)(3)(iii) shall be prepared by or on behalf of the distributing corporation and signed under penalties of perjury by an authorized officer of the distributing corporation. The agreement provided by the distributing corporation shall set forth the ~~following~~ items, under the heading "GAIN RECOGNITION AGREEMENT UNDER § 1.367(e)–1(c)(3)(iii)", with paragraphs labeled to correspond with such items:

(A) A declaration that the distribution is one to which § 1.367(e)–1(c)(3) applies.

(B) A description of each foreign distributee of the distributing corporation for which nonrecognition is claimed under this paragraph (c)(3), which shall include the distributee's—

(1) Name;

(2) Address;

(3) Taxpayer identification number (if any); and

(4) Residence and citizenship (in the case of an individual) or place of incorporation (in the case of a corporation).

(C) A description of the stock and securities of the distributing and controlled corporations owned immediately before and after the distribution by each distributee for which nonrecognition is claimed under this paragraph (c)(3), including—

(1) The number or amount of shares;

(2) The type of stock or securities;

(3) The fair market values of the stock and securities of the controlled corporation distributed to the foreign distributee, determined as of the date of the distribution;

(4) The fair market values of the stock and securities of the distributing corporation owned by the foreign distributee, determined immediately after the distribution;

(5) The total fair market values of the outstanding stock and securities of the distributing corporation, determined immediately after the distribution;

(6) The total fair market values of the distributed stock and securities of the controlled corporation, determined immediately before the distribution;

(7) The distributing corporation's adjusted basis in the distributed stock and securities immediately before the distribution (computed according to the provisions of paragraph (b)(2) of this section); and

(8) For each applicable valuation, a summary of the method (including appraisals, if any) used for determining the values required by this paragraph (c)(3)(iii).

(D) The distributing corporation's agreement to recognize gain in accordance with paragraph (c)(3)(vii) of this section.

(E) A waiver of the period of limitations as described in paragraph (c)(3)(iv) of this section.

(F) An attached statement from each foreign distributee for which nonrecognition is claimed under this paragraph (c)(3) declaring that the foreign distributee shall provide to the distributing corporation the annual certifications described in paragraph (c)(3)(v)(A) of this section for each of the taxable years of the distributing corporation, beginning with the taxable year of the distribution and ending with the taxable year that includes the close of the 60-month period following the taxable year of the distributing corporation in which the distribution was made.

(G) An agreement by the distributing corporation to attach to its income tax return the annual certification described in paragraph (c)(3)(v)(A) of this section and the statement described in paragraph (c)(3)(v)(B) of this section, in accordance with paragraph (c)(3)(v) of this section.

(H) A statement that arrangements have been made to ensure that the distributing corporation will be informed of any subsequent disposition by the foreign distributee of any stock or securities of the distributing or controlled corporation that are subject to the gain recognition agreement described in this paragraph (c)(3)(iii).

(iv) *Waiver of period of limitation.* The distributing corporation must file, with the gain recognition agreement described in paragraph (c)(3)(iii) of this section, a waiver of the period of limitation on the assessment of tax upon the gain realized on the distribution to the foreign distributee for which

nonrecognition is claimed under this paragraph (c)(3). The waiver shall be executed on such forms as are prescribed therefor by the Commissioner and shall extend the period for assessment of such tax to a date not earlier than the close of the eighth full taxable year following the taxable year that includes the distribution. If the requirements of paragraph (c)(3)(ii)(C)(*2*) of this section are satisfied, a waiver of the period of limitation on the assessment of tax upon the gain realized on the distribution must be filed in accordance with the requirements of this paragraph (c)(3)(iv) by or on behalf of the controlled corporation.

(v) *Annual certification.* For each of the taxable years of the distributing corporation, beginning with the taxable year of the distribution and ending with the taxable year that includes the close of the 60-month period following the end of the taxable year of the distributing corporation in which the distribution was made, the distributing corporation must file with its income tax return the annual certification for that year described in this paragraph (c)(3)(v).

(A) Each foreign distributee for which nonrecognition is claimed under this paragraph (c)(3) must provide an annual certification, signed under penalties of perjury by an authorized officer of the foreign distributee corporation or by the individual foreign distributee (as the case may be). Each annual certification must identify the distribution with respect to which it is given by setting forth the date and a summary description of the distribution. In the annual certification, the foreign distributee must declare that—

(*1*) The foreign distributee continues to be, without interruption, a resident of (in the case of an individual foreign distributee) or incorporated in (in the case of a foreign distributee corporation) a country described in paragraph (c)(3)(ii)(D) of this section;

(*2*) The foreign distributee continues to own, without interruption, the stock and securities of the distributing and controlled corporations as described in paragraph (c)(3)(ii)(E) of this section (except to the extent the stock or securities have been disposed of in a transaction described in paragraph (c)(3)(vi) of this section); and

(*3*) If the foreign distributee is a corporation, the foreign distributee continues to meet the active trade or business requirement of paragraph (c)(3)(ii)(B) of this section.

(B) The distributing corporation must attach a statement to the annual certification described in paragraph (c)(3)(v)(A) of this section, signed under penalties of perjury by an authorized officer of the corporation, in which the corporation declares that, to the best of its knowledge, the annual certification is true.

(vi) *Special rule for nonrecognition transactions.* (A) Gain shall not be recognized under paragraph (c)(3)(vii) of this section upon a disposition of stock or securities of the distributing or controlled corporation (or a successor in interest, as defined in this paragraph (c)(3)(vi)) that are subject to a gain recognition agreement described in paragraph (c)(3)(iii) of this section if the requirements of this paragraph (c)(3)(vi) are satisfied and the disposition consists of a transfer described in section 332, 337, 351, 354, or 356, or sections 361 and 381(a)(2).

(B) For purposes of this section, the term successor in interest refers to—

(*1*) Any corporation that acquires the assets of the distributing or controlled corporation (or a successor in interest) in a transaction described in section 381(a) to which this paragraph (c)(3)(vi) applies;

(*2*) Any corporation that acquires the stock or securities of the distributing or controlled corporation (or a successor in interest) in a transaction to which this paragraph (c)(3)(vi) applies;

(*3*) Any corporation whose stock or securities are exchanged for the stock or securities of the distributing or controlled corporation (or a successor in interest) in a transaction described in section 351, 354 or 356 to which this paragraph (c)(3)(vi) applies.

(C) Gain shall not be recognized under paragraph (c)(3)(vii) of this section upon a disposition of stock or securities of the distributing or controlled corporation (or a successor in interest) pursuant to a transaction described in paragraph (c)(3)(vi)(A) of this section if the following requirements are satisfied.

(*1*) Immediately after the transaction and at all times until the end of the 60-month period described in paragraph (c)(3)(vii)(A) of this section, the foreign distributee (or a successor in interest that acquires the assets of the foreign distributee in a transaction described in section 381(a) to which this paragraph (c)(3)(vi) applies) must continue to own directly or indirectly at least 80 percent of the vote and value of the stock and securities of the distributing corporation, and at least 80 percent of the vote and value of the stock and securities of the controlled corporation (or of a successor in interest that acquires the assets of the distributing or controlled corporation, as the case may be, in a transaction described in section 381(a) to which this paragraph (c)(3)(vi) applies), that it owned immediately after the distribution. The requirements of this paragraph (c)(3)(vi)(C)(*1*), however, will not be violated if such ownership drops below the 80 percent threshold by reason of a disposition of the stock or securities of the distributing or controlled corporation (or of a successor in interest that acquires the assets of the distributing or controlled corporation, as the case may be, in a transaction described in section 381(a) to which this paragraph (c)(3)(vi) applies) in a transaction subject to the gain recognition provisions of paragraph (c)(3)(vii) of this section.

(*2*) In a transaction involving a transfer of the assets of the distributing or controlled corporation described in section 381(a), the acquiring corporation must be a domestic corporation.

(*3*) The following information and agreements must be included with the first annual certification filed under paragraph (c)(3)(v) of this section after the transaction—

(*i*) A description of the transaction (including a statement of applicable Code provisions, and a description of stock or securities transferred, exchanged or received in the transaction);

(*ii*) A description of each successor in interest (including the name, address, taxpayer identification number (if any), and place of incorporation of the successor in interest);

(*iii*) Except in the case of a transaction described in section 381(a) pursuant to which the distributing corporation goes out of existence, an agreement of the distributing corporation (amending the agreement described in paragraph (c)(3)(iii) of this section), signed under penalties of perjury by an authorized officer of the corporation, to recognize gain in accordance with the provisions of this paragraph (c)(3) upon the occurrence of any of the following events (to the extent applicable): A disposition by the foreign distributee (or a successor in interest) of any stock or securities of a successor in interest that are subject to the provisions of this paragraph (c)(3)(vi) (other than a disposition that itself satisfies the requirements of this paragraph (c)(3)(vi)); a disposition by a successor in interest of any of the stock or securities of the distributing or controlled corporation (or a successor in interest) that are subject to the provisions of this paragraph (c)(3)(vi) (other than a disposition that itself satisfies the requirements of this paragraph (c)(3)(vi)); or any material failure to satisfy the requirements of this paragraph (c)(3) (or the terms of an agreement submitted pursuant hereto)

with respect to the stock or securities of a successor in interest or the transferred stock or securities of the distributing or controlled corporation;

(*iv*) In the case of a transaction described in section 381(a) pursuant to which the distributing corporation goes out of existence, an agreement of the successor in interest that acquires the assets of the distributing corporation in the transaction, signed under penalties of perjury by an authorized officer of the successor in interest corporation, to succeed to all of the responsibilities and duties of the distributing corporation under this paragraph (c)(3);

(*v*) To the extent applicable, an agreement of each successor in interest, signed under penalties of perjury by an authorized officer of the corporation, to succeed to all of the responsibilities and duties of a foreign distributee under this paragraph (c)(3), as applied to the transferred stock and securities of the distributing or controlled corporation (or stock and securities of a successor in interest). The successor in interest, however, is required to comply with the provisions of paragraph (c)(3)(ii)(B) of this section only if the corporation acquires the assets of the foreign distributee in a transaction described in section 381(a). In the case of a successor in interest that is a domestic corporation, the successor in interest is not required to comply with the requirements of paragraph (c)(3)(ii)(D) of this section;

(*vi*) To the extent applicable, an agreement of the foreign distributee, signed under penalties of perjury by the individual or an authorized officer of the corporation (as the case may be), to comply with all responsibilities and duties of this paragraph (c)(3), as applied with respect to stock or securities of a successor in interest received in the transaction.

(D) Any property received (or treated as received) in a transaction described in this paragraph (c)(3)(vi) for which gain is required to be recognized under United States income tax principles shall be treated as an amount received in a disposition subject to the provisions of paragraph (c)(3)(vii) of this section.

(vii) *Recognition of gain.* (A) If, prior to the close of the 60-month period following the end of the taxable year of the distributing corporation in which the distribution was made, the foreign distributee disposes of the stock or securities of either the distributing or controlled corporation that the foreign distributee owned immediately after the distribution, as described in paragraph (c)(3)(ii)(E) of this section (other than pursuant to a transfer described in paragraph (c)(3)(vi) of this section), then by the 90th day thereafter the distributing corporation must file an amended return for the year of the distribution and recognize the gain realized but not recognized upon such distribution. For purposes of this paragraph (c)(3)(vii)(A), a disposition includes, but is not limited to, any disposition treated as a sale or exchange under this title.

(B) The gain shall be computed as if there had been a sale of the distributed stock or securities at fair market value at the time of the distribution. If the foreign distributee disposes of only a portion of the stock and securities of the distributing or controlled corporation, the distributing corporation shall be required to recognize only a proportionate amount of the gain realized but not recognized upon the initial distribution of the stock and securities of the controlled corporation to the foreign distributee. The proportion of the gain required to be recognized shall be equal to the same proportion that the value (determined immediately after the distribution) of the stock and securities of the distributing corporation or controlled corporation (as the case may be) disposed of by the foreign distributee bears to the total value (determined immediately after the distribution) of the stock and securities in such corporation owned by the foreign distributee immediately after the distribution (taking account of stock and securities of the distributing or controlled corporation later acquired from the distributing or controlled corporation for which the distributee has a holding period determined under section 1223 by reference to such stock or securities). However, gain recognized pursuant to this paragraph (c)(3)(vii)(B) on the disposition by the foreign distributee of stock or securities of either the distributing corporation or the controlled corporation (as the case may be) shall not exceed the excess of the gain required to be recognized by the distributing corporation under the gain recognition agreement solely by reason of such disposition and all prior dispositions of the stock and securities of such corporation over the gain already recognized by the distributing corporation under the gain recognition agreement solely by reason of dispositions by the foreign distributee of the stock and securities of the other corporation.

(C) For purposes of computing gain under this paragraph (c)(3)(vii), the following rules shall govern dispositions of stock or securities of the distributing or controlled corporation by a successor in interest, or dispositions of stock or securities of a successor in interest.

(*1*) A disposition by a successor in interest of stock or securities of the distributing or controlled corporation that were acquired in a transaction described in paragraph (c)(3)(vi) of this section shall be treated as a disposition of such stock or securities by a foreign distributee.

(*2*) A disposition by a foreign distributee of a portion of stock and securities of a successor in interest that were received in exchange for stock and securities of the distributing or controlled corporation (as the case may be) in a transaction described in paragraph (c)(3)(vi) of this section shall be treated as a disposition of a proportionate share of such stock and securities of the distributing or controlled corporation owned by the successor in interest at the time of the disposition. The proportionate share shall equal the same proportion that the amount of stock and securities of the successor in interest disposed of bears to the total of stock and securities of the successor in interest originally received in exchange for the stock and securities of the distributing or controlled corporation.

(*3*) Other dispositions of stock or securities of a successor in interest to which paragraph (c)(3)(vi) of this section applies shall result in gain recognition in a manner consistent with the principles of this paragraph (c)(3)(vii)(C).

(D) If additional tax is required to be paid by the distributing corporation for the year of the distribution, interest must be paid by the distributing corporation on that amount at the rates determined under section 6621 with respect to the period between the date that was prescribed for filing the distributing corporation's original income tax return for the year of the distribution and the date on which the additional tax for that year is paid.

(E) Net operating losses, capital losses, or credits against tax that were available in the year of the distribution and that are unused (whether or not they have expired since the distribution) at the time of gain recognition described in this paragraph (c)(vii) may be applied (respectively) against any gain recognized or tax owed by reason of this provision, but no other adjustments shall be made with respect to any other items of income or deduction in the year of distribution or other years.

(viii) *Failure to comply.* (A) Except as otherwise provided in paragraph (c)(3)(viii)(B) of this section, if the distributing corporation fails to comply in any material respect with the

requirements of this paragraph (c)(3) or with the terms of an agreement submitted pursuant hereto, or if the distributing corporation knows or has reason to know of any failure of another person to so comply, the distributing corporation shall treat the initial distribution of the stock or securities of the controlled corporation as a taxable exchange in the year of the distribution. In such event, the period for assessment of tax shall be extended until three years after the date on which the Internal Revenue Service receives actual notice of such failure to comply.

(B) If a person fails to comply in any material respect with the requirements of this paragraph (c)(3) or with the terms of an agreement submitted pursuant hereto, the provisions of paragraph (c)(3)(viii)(A) of this section shall not apply if the person is able to show that such failure was due to reasonable cause and not willful neglect, provided that the person achieves compliance as soon as he becomes aware of the failure. Whether a failure to materially comply was due to reasonable cause shall be determined by the district director under all the facts and circumstances.

(d) *Other consequences*—(1) *Distributee basis in stock.* Except where section 897(e)(1) and the regulations thereunder cause gain to be recognized by the distributee, the basis of the distributed domestic or foreign corporation stock in the hands of the foreign distributee shall be the basis of the distributed stock determined under section 358 without any increase for any gain recognized by the domestic corporation on the distribution.

(2) *Exchange under section 897(e)(1).* With respect to the treatment under section 897(e)(1) of a foreign distributee on the receipt of stock or securities of a domestic or foreign corporation where the foreign distributee's interest in the distributing domestic corporation is a United States real property interest, see section 897(e)(1) and the regulations thereunder.

(3) *Dividend treatment under section 1248.* With respect to the treatment as a dividend of a portion of the gain recognized by the domestic corporation on the distribution of the stock of certain foreign corporations, see section 1248 (a) and (f) and the regulations thereunder.

(4) *Distribution of stock of a passive foreign investment company.* [Reserved]

(5) *No Reporting under section 6038B.* No notice shall be required under section 6038B with respect to a distribution described in this section.

(e) *Examples.* The rules of paragraphs (b), (c), and (d) of this section may be illustrated by the following examples:

Example 1. (i) FC, a Country X corporation, owns all of the outstanding stock of DC1, a domestic corporation. DC1 owns all of the outstanding stock of DC2, another domestic corporation. The fair market value of the DC1 stock is 300x, and FC has a 100x basis in the DC1 stock. The fair market value of the DC2 stock is 180x, and DC1 has a 40x basis in the DC2 stock. Neither DC1 nor DC2 is a U.S. real property holding corporation. Country X does not maintain an income tax treaty with the United States.

(ii) In a transaction qualifying for nonrecognition under section 355(a), DC1 distributes all of the stock of DC2 to FC. After the distribution, the DC1 stock has a fair market value of 120x.

(iii) Under paragraphs (b) (1) and (2) of this section, DC1 recognizes gain of 140x, which is the difference between the fair market value (180x) and the basis (40x) of the stock distributed. Under paragraph (d)(1) of this section and section 358, FC takes a basis of 40x in the DC1 stock, and a basis of 60x in the DC2 stock.

Example 2. (i) C, a citizen and resident of Country F, owns all of the stock of DC, a U.S. real property holding corporation. The fair market value of the DC stock is 500x, and C has a 100x basis in the DC stock.

(ii) In a transaction qualifying for nonrecognition under section 355(a), DC distributes to C all of the stock of DC2, a domestic corporation. DC and DC2 are U.S. real property holding corporations immediately after the distribution. The DC2 stock has a fair market value of 200x, and DC has a 180x basis in the DC2 stock. After the distribution, the DC stock has a fair market value of 300x.

(iii) Under paragraph (c)(1) of this section, DC does not recognize gain on the distribution of the DC2 stock because DC and DC2 are U.S. real property holding corporations immediately after the distribution.

(iv) Under section 897(e) and the regulations thereunder, C is considered to have exchanged DC stock with a fair market value of 200x and an adjusted basis of 40x for DC2 stock with a fair market value of 200x. Because DC2 is a U.S. real property holding corporation, and its stock is a U.S. real property interest, C does not recognize any gain under section 897(e) on the distribution. C takes a basis of 40x in the DC2 stock, and its basis in the DC stock is reduced to 60x pursuant to section 358.

Example 3. (i) All of the outstanding common stock of DC, a domestic corporation, is regularly traded on an established securities market located in the United States. None of the foreign shareholders of DC directly or indirectly owns more than five percent of the common stock of DC.

(ii) In a transaction qualifying for nonrecognition under section 355(a), DC distributes all of the stock of DS, a domestic corporation, to the common shareholders of DC. The stock of DS has appreciated in the hands of DC.

(iii) Under paragraph (c)(2) of this section, DC does not recognize gain on the distribution of the DS stock to any foreign distributee. Each shareholder's basis in the DC and DS stock is determined pursuant to section 358.

Example 4. (i) FC, a Country X corporation, owns all of the stock of DC1, a domestic corporation. The fair market value of the DC1 stock is 1,000x, and FC has a basis in the DC1 stock of 800x. Country X maintains an income tax treaty with the United States that includes an information exchange provision. In addition to owning stock in DC1, FC directly engages in an active trade or business in Country X.

(ii) In a transaction qualifying for nonrecognition under section 355(a), DC1 distributes to FC all of the stock of DC2, a domestic corporation. The DC2 stock has a fair market value of 500x at the time of the distribution, and DC1 has a 100x basis in the DC2 stock. Immediately after the distribution, the DC1 stock has a fair market value of 500x. Neither DC1 or DC2 is a U.S. real property holding corporation.

(iii) Under paragraph (c)(3) of this section, DC1 will not recognize gain on the distribution of the DC2 stock if DC1 enters into a gain recognition agreement, as described in paragraph (c)(3)(iii), and DC1 and FC otherwise comply with all of the provisions of paragraph (c)(3) of this section. Pursuant to section 358, FC will take a 400x basis in the DC2 stock and FC's basis in the DC1 stock will be reduced to 400x.

Example 5. (i) Assume the same facts as in *Example 4* and that DC1 enters into a gain recognition agreement pursuant to paragraph (c)(3) of this section. Two years after DC1's distribution of DC2 stock to FC, FC sells 25 percent of the DC2 stock to Y, an unrelated corporation. One year after the DC2 stock sale, FC sells 50 percent of its DC1 stock to Z, another unrelated corporation. In the next year, FC sells to Y an additional amount of DC2 stock representing 10% of the DC2 shares distributed to FC.

(ii) Under paragraph (c)(3)(vii) of this section, upon FC's sale of 25 percent of its DC2 stock, DC1 is required to file an amended return for the year in which the DC2 stock was distributed to FC, and recognize 100x of gain, which represents 25 percent of the gain realized but not recognized on the distribution.

(iii) Upon FC's subsequent sale of 50 percent of its DC1 stock, DC1 is required to file another amended return for the year of the distribution and recognize an additional 100x of gain. This represents the excess of the total amount of gain required to be recognized under the gain recognition agreement, determined solely by reference to FC's disposition of DC1 stock (200x), over the gain previously required to be recognized under the agreement, determined solely by reference to FC's disposition of DC2 stock (100x).

(iv) Upon FC's sale of additional DC2 stock representing 10 percent of the DC2 stock distributed to it, DC1 is not required to recognize additional gain. This is because the total amount of gain already recognized by DC1 under the gain recognition agreement solely by reason of FC's disposition of DC1 stock (200x) exceeds the amount gain that would be required to be recognized under the agreement solely by reason of FC's total dispositions of DC2 stock (40x plus 100x).

Example 6. (i) Assume the same facts as in *Example 4* and that DC1 enters into a gain

recognition agreement pursuant to paragraph (c)(3) of this section. One year after DC1's distribution of DC2 stock to FC, FC transfers all of the DC2 stock to FS, a Country X corporation, in a transaction described in section 351. FC receives, in exchange for the DC2 stock, FS stock possessing 90 percent of the voting power and value of all of the outstanding stock of FS. The remaining 10 percent of the stock of FS is issued in the transaction to C, an unrelated corporation.

(ii) DC1 will not recognize gain under the gain recognition agreement upon FC's disposition of the stock of DC2 if DC1 enters into a new agreement to recognize gain on FC's disposition of the FS stock or FS's disposition of the DC2 stock, and DC1, FC and FS otherwise comply with the successor in interest provisions of paragraph (c)(3)(vi) of this section.

(iii) Assume that two years after DC1 enters into a new gain recognition agreement in accordance with paragraph (c)(3)(vi) of this section, FS sells one-half of its DC2 stock. One year later, FC sells one-half of its FS stock. Upon FS's sale of the DC2 stock, DC1 is required to file an amended return for the year in which the DC2 stock was distributed to FC, and recognize 200x (one-half of 400x) of the gain realized but not recognized on the distribution. Upon FC's subsequent sale of the FS stock, the entire remaining amount of gain realized on the distribution (200x) is required to be recognized pursuant to paragraph (c)(3)(vii) of this section because FC no longer complies with paragraph (c)(3)(vi)(C)(*1*) of this section. Therefore, paragraph (c)(3)(vii)(C)(*2*) of this section does not apply to determine the amount of gain required to be recognized upon FC's sale of the FS stock.

Example 7. (i) P1, a partnership organized under the laws of Country X, owns all of the outstanding stock of DC1, a domestic corporation. DC1 owns all of the outstanding stock of DC2, another domestic corporation. The fair market value of the DC1 stock is 800x and P1 has an 800x basis in the DC1 stock. The fair market value of the DC2 stock is 600x and DC1 has a 400x basis in the DC2 stock. Neither DC1 nor DC2 is a U.S. real property holding corporation.

(ii) Y, a Country X corporation, and P2, another partnership organized under the laws of Country X, are the sole partners of P1. Under the rules and principles of sections 701 through 761, Y and P2 are each entitled to a 50 percent distributive share of each item of P1 income and loss. V, a domestic corporation, and Z, a Country X corporation, are the sole partners of P2. Under the rules and principles of sections 701 through 761, V and Z are each entitled to a 50 percent distributive share of each item of P2 income and loss.

(iii) In a distribution qualifying for nonrecognition under section 355(a), DC1 distributes all of the stock of DC2 to P1. Because the distribution is to a partnership, DC1 may not avoid recognition of gain on the distribution by entering into a gain recognition agreement pursuant to paragraph (c)(3) of this section (unless DC1 obtains a ruling from the Internal Revenue Service to the contrary).

(iv) Under paragraph (b)(5) of this section, if DC1 establishes that V is a domestic corporation that owns a 50 percent interest in P2, which owns a 50 percent interest in P1, DC1 will be required to recognize only 75 percent (150x) of the gain realized on the distribution. This gain must be recognized even though P1 would not realize any gain on a sale of the DC2 stock following the distribution because its basis in the stock (600x) equals the stock's fair market value (600x).

Example 8. (i) DC1, a domestic corporation, owns all of the stock of DC2, also a domestic corporation. The stock of DC1 is owned equally by X, a domestic corporation, and FY, a Country Y corporation.

(ii) A short time before DC1 adopted a plan to distribute the stock of DC2 to its shareholders, but after the board of directors of DC1 began contemplating the distribution, FY formed Newco, a domestic corporation, and contributed its DC1 stock to Newco in a transaction qualifying for nonrecognition under section 351. A valid business purpose existed for FY's transfer of the DC1 stock to Newco, but this business purpose would have been fulfilled irrespective of whether FY transferred the stock to Newco before the distribution of DC2, or after the distribution of DC2 (in which case FY would have transferred the stock of DC1 and DC2 to Newco).

(iii) Pursuant to paragraph (b)(6) of this section, the District Director may determine that FY formed Newco for a principal purpose of avoiding section 367(e)(1). In such case, for federal income tax purposes, FY will be treated as having received the stock of DC2 in a section 355 distribution, and then as having transferred the stock to Newco in a section 351 transaction.

(f) *Effective date.* This section shall be effective with respect to distributions occurring on or after January 16, 1993. However, a corporation may elect to apply this section to all distributions made by it after February 15, 1990, and before January 16, 1993, to which section 367(e)(1) applies, by timely filing an original or amended return for the year of distribution, and otherwise complying with the provisions of this section. A corporation making such an election may choose to comply with § 1.367(e)–1T(c)(2)(i)(C) (as contained in the 26 CFR part 1 edition revised as of April 1, 1992) instead of paragraph (c)(3)(ii)(B) of this section, and any annual certification submitted in compliance with § 1.367(e)–1T(c)(2)(ii)(F) (as contained in the 26 CFR part 1 edition revised as of April 1, 1992), prior to January 16, 1993, will be considered as complying with the annual certification requirements of paragraph (c)(3)(v) of this section.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 4. The authority citation for Part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

§ 602.10 [Amended]

Par. 5. Section 602.101(c) is amended by removing from the table "§ 1.367 (e)-1T * * * 1545–1124" and adding in its place "§ 1.367 (e)–1 * * * 1545–1124".

Approved: January 4, 1993.

Shirley D. Peterson,

Commissioner of Internal Revenue.

Approved: January 4, 1993.

Alan J. Wilensky,

Acting Assistant Secretary of the Treasury.

[FR Doc. 93–1398 Filed 1–15–93; 3:50 pm]

BILLING CODE 4830–01–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 61, 64, 65, and 69

[CC Docket No. 91–141, FCC 92–552]

Expanded Interconnection With Local Telephone Company Facilities; Correction

AGENCY: Federal Communications Commission.

ACTION: Correction to final rule.

SUMMARY: This document contains corrections to the final rules published Thursday, December 31, 1992. The rules related to the modification requiring Tier 1 LECs to file initial tariffs for only a subset of their central offices, and to establish new procedures for the tariffing of additional central offices thereafter.

EFFECTIVE DATE: February 16, 1993, except that the requirements that Southwestern Bell Telephone Co. (SW Bell) file a list of central offices by December 28, 1992 and that interconnectors be permitted to request additional offices on or before January 15, 1993 shall be operative upon the release of the Order.

FOR FURTHER INFORMATION CONTACT: Douglas L. Slotten, 202–653–6975, or Linda L. Haller, 202–632–1298, Common Carrier Bureau, Policy and Program Planning Division.

SUPPLEMENTARY INFORMATION:

Need for Correction

As published, the Paperwork Reduction Act statement was inadvertently omitted from the materials included in the **Federal Register.**

Correction of Publication

Accordingly, the publication on Thursday, December 31, 1992, of the final rules, which were the subject of FR Doc. 92–31714, is corrected as follows:

On page 62482, column 2, the following should be inserted before the heading reading "Ordering Clauses":

Paperwork Reduction Act

Public reporting burden for this collection of information is estimated to average 0.25 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of the collection of information, including suggestions for reducing the burden to the Federal Communications Commission, Records Management Division, room 416, Paperwork Reduction Project, Washington, DC 20554, and to the Office of Management and Budget, Paperwork Reduction Project, Washington, DC 20503.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 93–1661 Filed 1–22–93; 8:45 am]

BILLING CODE 6712–01–M

---

47 CFR Part 73

[GC Docket No. 92–223; FCC 93–42]

Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. 1464

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: By this action, the Federal Communications Commission adopts regulations to establish the times of day during which indecent programming may not be broadcast on radio and television stations. The regulations, promulgated pursuant to section 16(a) of the Public Telecommunications Act of 1992, prohibit the broadcast of indecent material between the hours of 6 a.m. and 10 p.m. on public broadcast stations that go off the air at or before 12 midnight, prohibit the broadcast of indecent programming on all other broadcast stations between 6 a.m. and 12 midnight, and prohibit obscene broadcasts at all times.

EFFECTIVE DATE: February 24, 1993.

FOR FURTHER INFORMATION CONTACT: Peter Tenhula, Office of General Counsel, Federal Communications Commission, 202–254–6530.

SUPPLEMENTARY INFORMATION: 1. This is a summary of the Report and Order in GC Docket No. 92–223, adopted January 19, 1993. The full text of this document, including the Final Regulatory Flexibility Analysis, is available for public inspection and copying, Monday through Friday, 9 a.m. to 4:30 p.m. in the FCC Reference Center (room 239), 1919 M Street, NW., Washington, DC 20554, and may be purchased from the Commission's copy contractor, International Transcription Services, Inc., 202–857–3800, 2100 M Street, NW., suite 140, Washington, DC 20037.

2. This action is taken pursuant to section 16(a) of the Public Telecommunications Act of 1992, Public Law 102–356, section 16(a), 106 Stat. 949, 954 (1992), enacted August 26, 1992, which states that the Federal Communications Commission shall promulgate regulations to prohibit the broadcasting of indecent programming—

(1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and

(2) between 6 a.m. and 12 midnight on any day for any radio or television broadcast station not described in paragraph (1).

3. On October 5, 1992, the Commission released a Notice of Proposed Rule Making, 7 FCC Rcd 6464 (1992), 57 FR 46132, October 7, 1992, which invited interested parties to comment on proposed rules drafted in accordance with section 16(a) and 18 U.S.C. 1464, the principal statute governing obscene and indecent broadcasts. The Commission also asked commenters to update the record in connection with the presence of children in the viewing and listening audience as it relates to the government's interest in restricting the broadcasting of indecent material. In this Report and Order, the Commission adopts rules tracking section 16(a) and prohibiting the Broadcast of obscene programming at all times pursuant to 18 U.S.C. 1464.

4. In addition to amending § 73.3999 of the Commission's Rules (47 CFR 73.3999), the Commission's Report and Order addresses issues raised by the commenters, and previously by the courts, that are relevant to this proceeding, including the scope of the government's interest in regulating broadcast indecency, the definition of "children" for purposes of channeling indecent broadcast materials, and harm to children. The Report and Order also discusses the channeling approach to regulating broadcast indecency, concluding that although there is a reasonable risk that a significant number of children (defined as those ages 17 and under) are in the radio and television audience during all hours of the day and night, the "safe harbor" time period established by the statute and FCC regulations is necessary to accommodate the interests of broadcasters and adult listeners and viewers.

5. In the Report and Order, the Commission tentatively concludes that in enforcing restrictions on indecent broadcasts it will continue to consider, on a case-by-case basis, evidence from a station charged with indecent broadcasting that there was no actual risk that children were in the broadcast audience in the station's market at the time of the broadcast in question. The submission of market-wide data demonstrating that there was no appreciable child audience during the relevant time period may raise a viable defense to a charge of indecency outside of the safe harbor time period.

6. Accordingly, *it is ordered that*, For the reasons discussed in the Report and Order and pursuant to section 16(a) of the Public Telecommunications Act of 1992, Public Law 102–356, section 16(a), 106 Stat. 949, 954 (1992), and sections 4 (i) and (j), 303 and 312 of the Communications Act of 1934, as amended (47 U.S.C. 154 (i) and (j), 303, 312), § 73.3999 of the Commission's Rules (47 CFR § 73.3999) is amended, as set forth below.

List of Subjects in 47 CFR Part 73

Radio broadcasting, Television broadcasting.

Amendatory Text

Part 73, chapter I of title 47 of the Code of Federal Regulations is amended as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

2. Section 73.3999 is revised to read as follows:

§ 73.3999 Enforcement of 18 U.S.C. 1464 (restrictions on the transmission of obscene and indecent material).

(a) No licensee of a radio or television broadcast station shall broadcast any material which is obscene.

(b) No licensee of a public broadcast station, as defined in 47 U.S.C. 397(6), that goes off the air at or before 12 midnight shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent.

(c) No licensee of a radio or television broadcast station not described in paragraph (b) of this section shall broadcast on any day between 6 a.m. and 12 midnight any material which is indecent.

Federal Communications Commission.
William F. Caton,
Acting Secretary.
[FR Doc. 93-1763 Filed 1-22-93; 8:45 am]
BILLING CODE 6712-01-M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AA98

Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for the Bruneau Hot Springsnail in Southwestern Idaho

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The U.S. Fish and Wildlife Service (Service) determines endangered status pursuant to the Endangered Species Act of 1973, as amended (Act), for the Bruneau Hot Springsnail (*Pyrgulopsis bruneauensis*). This species occurs only in a complex of related thermal springs and their immediate outflows along the Bruneau River in Owyhee County, Idaho. The primary threat to this species is the reduction of thermal spring habitats from agricultural-related ground water withdrawal/pumping. This rule implements the protection and recovery provisions afforded by the Act for this aquatic snail.

DATES: The effective date of this rule is February 24, 1993.

ADDRESSES: The complete file for this rule is available for inspection, by appointment, during normal business hours at the Boise Field Office, U.S. Field and Wildlife Service, 4696 Overland Road, room 576, Boise, Idaho 83705.

FOR FURTHER INFORMATION CONTACT: Dr. Charles H. Lobdell at the above address (telephone 208/334-1931).

SUPPLEMENTARY INFORMATION:

Background

Borys Malkin first collected the Bruneau Hot Springsnail in springflows at the Indian Bathtub in upper Hot Creek along the Bruneau River in 1952. The following year, W.F. Barr collected additional specimens, which were sent to the U.S. National Museum in Washington, DC (now the National Museum of Natural History) (Taylor 1982). Morrison determined that it represented a previously unknown genus and species of springsnail of the family *Hydrobiidae*. Dwight Taylor (1982) pursued subsequent field and laboratory studies of this snail from 1959 through 1982. Based on these studies, Taylor prepared a brief physiological and biological description of the species and suggested the common name of the Bruneau Hot Spring Snail. In 1990, Robert Hershler formally described the species from type specimens collected from the Indian Bathtub in Hot Creek, naming it *Pyrgulopsis bruneauensis*, with a new common name of Bruneau Hot Springsnail (Hershler 1990).

Adult Bruneau Hot Springsnails have a small, globose to low-conic shell reaching a length of 5.5 millimeters (mm) (.22 inch) with 3.75 to 4.25 whorls. Fresh shells are thin, transparent, white-clear, appearing black due to pigmentation (Hershler 1990). In addition to its small size (<2.8 mm (.11 inch) shell height), distinguishing features include a verge (penis) with a small lobe bearing a single distal glandular ridge and elongate, muscular filament. They are dioecious and lay single round to oval eggs on hard surfaces such as rock substrates or other snail shells.

The Bruneau Hot Springsnail is found only in the springflows of Hot Creek and 128 small, flowing thermal springs and seeps along an approximately 8.5 kilometer (km) (5.28 mile) length of the Bruneau River in southwestern Idaho (Mladenka 1992). A majority (n=116) of occupied springsnail habitats are located along both shorelines of the Bruneau River up to 4.46 km (2.77 miles) above its confluence with Hot Creek while the remaining sites occur up to 4.30 km (2.67 miles) below the Hot Creek-Bruneau River confluence. Most of the springs and seeps containing springsnails are small, ranging from 0.15 square meters (m) (1.6 square feet (ft)) to 37 square m (398 square ft) in area, with a mean size of almost 1 square m (10.8 square ft). These spring sites are located primarily above the high-water mark of the Bruneau River and are separated by distances of less than 1 m (3.28 ft) to greater than 2,000 m (6,562 ft) (Mladenka 1992). The Indian Bathtub area (the type locality, now covered with sediment) and most of the springs along the Bruneau River upstream of Hot Creek are on lands administered by the Bureau of Land Management (Bureau), while most springsnail habitats downstream of the Indian Bathtub and Hot Creek are on private land.

There are no additional historic records for this species from the United states or elsewhere. Additional surveys of thermal springs in the Bruneau and Jarbridge River Basins in southwest Idaho and the Owyhee River in southeast Oregon conducted during January, 1987, and several springs along the West Fork Bruneau River in 1990, failed to locate additional populations (Pat Olmstead, Bureau of Land Management, pers. comm.).

The species has been found in flowing thermal springs and seeps with temperatures ranging from 15.7 °C to 35.7 °C, with highest densities (>1,000 per square m (10.8 square ft)) of snails noted at temperatures ranging from 24.8 °C to 35.7 °C (Mladenka 1992. No Bruneau Hot Springsnails have been collected outside thermal plumes of hot springs entering the Bruneau River. They are found in these habitats on the exposed surfaces of various substrates, including rocks, gravel, sand, mud and algal film. However, during the winter period of cold ambient temperatures and icing, the springsnails are most often located on the undersides of outflow substrates, habitats least exposed to cold temperatures. In madicolous habitats (thin sheets of water flowing over rock faces), the species has been found in water depths less than 1 centimeter (cm) (.39 inch). Current velocity is not considered a significant factor limiting the springsnails distribution, since they have been observed to inhabit nearly 100 percent of the available current regimes. In a September 1989 survey of 10 thermal springs containing the species in the vicinity of the Hot Creek-Bruneau River confluence, the total number of snails per spring ranged from 1 to 17,319 (Mladenka 1992). Springsnail abundance generally fluctuates seasonally; abundance is influenced primarily by water temperature, spring discharge and food availability.

Springsnails appear to be opportunistic grazers as food habit studies reveal algal genera are taken in proportions similar to those found in their habitat (Mladenka 1992). However, springsnail densities are lowest in areas of bright green algal mats, while higher snail densities occur where periphyton communities are dominated by diatoms. Based on laboratory studies, springsnail growth was retarded at cooler temperatures (<24 °C).

Sexual maturity can occur at two months, with a sex ratio of approximately 1:1. Reproduction occurs throughout the year except when inhibited by high or low temperatures (Mladenka 1992). Mladenka noted reproduction occurs at temperatures between 24° and 35 °C. At sites affected

by high ambient temperatures during summer and early fall months, recruitment was seasonal, corresponding with cooler periods. Likewise, sites with cooler ambient temperatures would likely exhibit recruitment during the summer months. Springsnails use "hard" surfaces such as rock substrate to deposit their eggs. They may deposit eggs on other snails' shells when other hard surfaces are unavailable.

Common aquatic community associates of the springsnail include three molluscs: *Physella gyrina* (Say) (Physidae), *Fossaria exigua* Lea (Lymnaeidae) and *Gyraulus vermicularis* Lea (Planorbidae); the creeping water bug *Ambrysus mormon minor* La Rivers (Naucoridae), which is also endemic to the Hot Creek thermal spring complex; and the skiff beetle *Hydroscapha natans* (Hydroscaphidae). In addition, Hot Creek and several of the thermal springs support populations of guppies, *Poecillia reticulata* and a species of *Tilapia*, an exotic fish in the family Cichlidae. It is believed that guppies were originally released into upper Hot Creek at the Indian Bathtub, from which they spread downstream and into nearby thermal springs and seeps (Bowler and Olmstead 1991).

The major threat to the Bruneau Hot Springsnail is the reduction or reduced water levels in thermal spring habitats from groundwater withdrawal/mining of the regional geothermal aquifer system. Within the past 25 years, flows from the Indian Bathtub springs have decreased, thereby restricting the springnail's habitat area and reducing its numbers. Recent studies indicate that natural discharge (= recharge) prior to ground water development in the Bruneau-Grandview area equalled approximately 23,000 acre feet per year, while groundwater pumpage in the area during 1991 was approximately 34,700 acre feet (Charles Berenbrock, U.S. Geological Survey (USGS), written communication). These figures indicate that withdrawals exceeded the estimate rate of recharge by nearly 12,000 acre feet during 1991, and upwards of 26,000 acre feet in 1981, when ground water pumpage was nearly 49,900 acre feet. Mladenka (1992) noted that the springsnail population in Hot Creek may have declined generally by 50 percent from Taylor's (1982) earlier estimates of abundance, and the species has been totally eliminated in local areas such as the Indain Bathtub springs. For example, in 1964 spring discharge at the Indian Bathtub was an estimated 2,400 gallons per minute (gpm). Following increased ground water development and pumpage in the mid-1960's, springflows at the Indian Bathtub had declined to 458 gpm by 1972. During June to July 1978, flow was down to between 130 to 162 gpm and by 1985 the spring no longer flowed during the irrigation season between July and October. Ongoing drought conditions since the mid-1980's have resulted in increased reliance on ground water for irrigated agriculture in the Bruneau basin, causing the extent of seepage at several of the springnail's spring sources to be greatly reduced in recent years. Considerable springsnail habitat has also been lost in recent years due to sedimentation from flash flooding. This is especially true for the Indian Bathtub spring area where the species was first discovered. Heavy sedimentation of gravel, sand and silt from a July 1992 flood totally covered over and eliminated remaining springsnail habitat in the Indian Bathtub and upper Hot Creek (Robinson et al. 1992).

Previous Federal Action

On May 22, 1984, the Service included in Bruneau Hot Springsnail as a category 1 candidate species in the invertebrate notice of review (49 FR 21664), based primarily on the results of field surveys conducted by Dr. Dwight Taylor. Category 1 candidates are taxa for which the Service has on file enough substantial information on biological vulnerability and threats to support proposals to list them as endangered or threatened species. The Service proposed the Bruneau Hot Springsnail for listing as endangered on August 21, 1985 (50 FR 33803). The comment period on this proposal, which originally closed on October 21, 1985, was extended to December 31, 1985 (50 FR 45443). To accommodate public hearings in Boise and Bruneau, Idaho, the comment period was reopened until February 1, 1986 (50 FR 51894). At the time of the hearings and subsequently, the Idaho Department of Water Resources (IDWR) and others questioned the Service's analysis of available scientific information. In particular, they believed that surveys of available habitat were incomplete and the analysis of human induced impacts was erroneous. In order to solicit additional information and adequately respond to these concerns, the Service on December 30, 1986 gave notice of a six month extension of the period of consideration and reopened the public comment period until February 6, 1987, to solicit additional information (51 FR 47033).

Following the six month extension period in which the IDWR proposed additional biological and hydrological studies in the Bruneau-Grandview area, a decision was agreed upon by Idaho's two U.S. Senators and the Service to develop a multi-agency cooperative conservation plan for the springsnail. Subsequently, the U.S. Congress allocated additional monies to the Service to fund these studies starting in 1987. Information gained from the studies was to be used to develop a cooperative conservation (management) plan to achieve the conservation and protection of the Bruneau Hot Springsnail, thus removing the threats facing the species and eliminating the need to list under the Act. The three entities involved in the studies for the cooperative conservation planning efforts included the IDWR, U.S. Geological Survey (USGS), and Idaho State University. The IDWR was to accomplish three primary tasks through the studies: (1) Prepare a Geographic Information System (GIS) for the study area, (2) prepare geological maps to define the bedrock geology and record the location, elevation, flow and temperature of area springflows, and (3) evaluate and analyze Federal and State laws applicable to a conservation plan for the springsnail and assess management alternatives open to IDWR to protect springsnail habitats. The Service also provided funds for the USGS to conduct a three-phase groundwater study of the Bruneau River valley and basin. This study focused on the hydrology of the regional geothermal system and surrounding hot springs, with an overall goal to determine the cause of declining springflows affecting the Bruneau Hot Springsnail. Finally, the Service provided funds to the Stream Ecology Center, Idaho State University, to study the biological, ecological, and physiological needs of the Bruneau Hot Springsnail. The Service also entered into a short-term conservation easement with Owen Ranches, Inc., owners of much of the snail's habitat in Hot Creek and the Indian Bathtub springs. Terms of the easement included fencing to regulate livestock use to improve stream flows. Expiration of this agreement would coincide with the completion of the hydrologic studies by USGS.

On July 6, 1992, the Idaho Conservation League and the Committee for Idaho's High Desert filed a lawsuit in Federal District Court in Boise, Idaho, over the Service's failure to make a final determination on the listing of the springsnail. In order to respond to the concerns raised in the lawsuit and to ensure the accuracy of any final decision concerning the appropriateness of listing, the Service reopened the

public comment period on October 5, 1992 (57 FR 45762), for a period of 30 days, and on December 18, 1992 (57 FR 60160), for a period of 10 days.

The Service now determines the Bruneau Hot Springsnail to be an endangered species with publication of this rule.

Summary of Comments and Recommendations

In the August 21, 1985, proposed rule and associated notifications, all interested parties were requested to submit factual reports or information that might contribute to the development of a final listing decision. Appropriate State agencies, county governments, Federal agencies, scientific organizations, and other interested parties were contacted and requested to comment. Newspaper notices inviting public comment were published in the Idaho Statesman and the Mountain Home News on November 18 and November 20, 1985, respectively. Two public hearings were held, the first on December 10, 1985, requested by the Idaho Department of Water Resources in Boise, and the second on January 15, 1986, in Grandview, Idaho, requested by Lieutenant Governor David Leroy and others. The comment period, which originally closed on October 21, 1985, was extended to December 31, 1985 (50 FR 45443), then again to February 1, 1986 (50 FR 51894), to accommodate these hearings. The public comment period was again reopened on December 30, 1986, until February 6, 1987 (52 FR 47033); on October 5, 1992 (57 FR 45762); and December 18, 1992 (57 FR 60160). These actions accommodated the receipt of additional information.

Comments in response to the proposed rule were received from 115 individuals and agencies. The Service considered all comments received, including oral testimony from two public hearings on the proposal to list the snail. Thirty-one of the commenters supported the proposal while 77 were opposed to the proposed action. The remaining commenters did not state an opinion on the listing; some provided new/substantive information, which has been incorporated into the final rule. The Bureau of Land Management and three conservation organizations: The Committee for Idaho's High Desert, Idaho Natural Resources Legal Foundation, Inc. and Defenders of Wildlife all supported the proposed listing. Comments opposed to the proposed listing were received from two U.S. Senators, former Idaho Governor John Evans, former Idaho Lieutenant Governor David Leroy, an Idaho State Senator and Idaho State Representative representing Elmore and Owyhee Counties, Idaho Water Resource Board, Idaho Department of Agriculture, Idaho Water Users Association, Idaho Cattle Association, National Cattlemen s Association, Idaho Water Resources Research Institute, and Idaho Farm Bureau. Opposition to the original proposed rule was based on several factors, including possible impacts to existing and further agricultural development in the affected area; assertions that surveys of available habitat and snail distribution used to prepare the proposed rule were inadequate; and that the analysis of ground water withdrawal impacts were erroneous. Comments of a similar nature or point of concern are grouped into a number of general issues. A summary of these issues and the Service's response to each are discussed below.

Issue 1. Several commenters requested that the Service delay or preclude listing the Bruneau Hot Springsnail because too little is known regarding its present status. They believed additional snail populations may exist in other locations. Some individuals provided locations of nearby springs where "small black snails" occur. Others believed the species may be more common or widespread than the Service stated in the proposed rule. In addition, several respondents suggested that the Service initiate a comprehensive studies program for the Bruneau Hot Springsnail to develop additional information on distribution and habitat requirements prior to any final listing decision. For example, in 1985 IDWR and Idaho's then Governor John V. Evans, supported a "two-year cooperative study" as the most sensible approach to this problem.

Service Response: The listing process includes an opportunity for the public to comment and provide information that is evaluated and considered by the Service before making a final decision. Aside from previously cited studies and reports in the 1985 proposed rule (50 FR 33803), the Service has reviewed and considered new information regarding distribution and general life history for the Bruneau Hot Springsnail from a recently completed 3-year study in the Bruneau River basin (Mladenka 1992). The study examined a larger geographical area than previous studies cited in the proposed rule and reported 128 additional thermal spring or seep sites along the Bruneau River over a distance of 8.5 km (5.28 miles) containing the species. However, given that all thermal springs along this reach of river arise from a single regional geothermal aquifer (Berenbrock, USGS, written communication), these newly discovered springsnail populations and their habitats are as threatened by continuing declines in Bruneau valley spring discharges as the remaining Hot Creek populations. Additionally, remaining populations are vulnerable to habitat alteration and loss from flash-flooding. Springsnail populations were drastically reduced in Hot Creek following a major flood (runoff) event in July 1992 (Robinson et al. 1992). In summary, the Bruneau Hot Springsnail remains endemic to a small geographic area in southwestern Idaho and is totally dependent upon thermal springflows originating from a common groundwater source for its survival.

Issue 2. Some commenters questioned whether the use of ground water for agricultural and aquacultural purposes is the primary cause of the reduced springflows in Hot Creek. They believe climatic and geologic factors may also be contributing to declining springflows and suggested that the Service conduct additional hydrology studies of the underlying aquifer and thermal springs in the Bruneau Valley prior to any listing decision on the springsnail.

Service Response: Despite the above claims, no new information was provided to contradict the Service's contention that the Bruneau Hot Springsnail is threatened by the reduction of its thermal spring habitats from agricultural-related ground water withdrawal/pumping and other threats present in the Bruneau area (see Factor A in "Summary of Factors Affecting the Species"). The USGS has developed a conceptual model of the geothermal aquifer system that characterizes the geohydrology of the aquifer system (Berenbrock, USGS, written communication). The conceptual model, using both direct and indirect evidence, also describes the hydraulic connection between the aquifer system and the series of thermal springflows along the Bruneau River containing Bruneau Hot Springnails. Additional information in the USGS study describes how over the past 25 years, discharge from many of the springs along Hot Creek and Bruneau River have decreased, especially springflows at the Indian Bathtub (Berenbrock, USGS, written communication). Spring discharge in 1964 was approximately 2,400 gpm, had dropped to between 130 to 162 gpm in June to July 1978 (Young et al. 1979), and by the summer of 1990 discharge was zero. The USGS believes that prior to extensive ground water development, recharge to the geothermal aquifer was balanced by discharge. Ground water flows northward through volcanic rocks from areas of recharge along the

Jarbridge and Owyhee Mountains to the Bruneau area, where it is discharged as either springflow or leaves the area as underflow. Natural recharge to and discharge from the regional geothermal aquifer underlaying the 600-square mile Bruneau area was estimated to be approximately 22,800 acre-feet per year (Berenbrock, USGS, written communication). Of that amount, approximately 10,100 acre-feet was discharged from springflows and the remaining 12,700 acre-feet was underflow. Ground water discharge (=withdrawal) from wells for domestic and agricultural purposes began during the late 1890's (Berenbrock, USGS, written communication). From 1890 to 1978, well discharge increased from 0 to approximately 40,600 acre-feet per year. Annual well discharge has exceeded annual recharge since 1965, when the rate of increase in ground water pumpage accelerated. Pumping has caused hydraulic heads or water levels in the volcanic rock portion of the geothermal aquifer to decline more than 9.5 m (30 ft) in much of the Bruneau area and at least 23 m (70 ft) in one USGS observation well. For example, in another well, water levels declined almost 3 m (10 ft) from 1979 to 1992, or about 0.2 m (.66 ft) per year. Changes in discharge from thermal springs corresponds with changes in hydraulic head, which normally fluctuate seasonally and are substantially less during late summer than in the spring.

At this time, there is no information available on how much of the recent decline in water levels can be attributed to the effects of protracted drought conditions throughout southwestern Idaho. Total well discharge (=ground water withdrawal) has declined from a maximum of 49,900 acre-feet in 1981 to 34,700 acre-feet in 1991, in large part due to area farmer participation in the Conservation Reserve Program administered by the U.S. Soil Conservation Service. Some individuals believe that under 'normal' (non-drought) conditions, a reduction in ground water withdrawal might cause water levels to recover or possibly slow their rate of decline (Idaho Department of Water Resources (IDWR) 1992). While drought may be a contributing factor, springflows at the Indian Bathtub and water levels in USGS observation wells in the volcanic rock portion of the aquifer continued to show a steady decline during the early 1980's period of normal precipitation prior to the onset of drought conditions beginning in 1986. The USGS believes that there is very little to no recharge in the geothermal aquifer from direct precipitation in the Bruneau area (Berenbrock, USGS, written communication) since a stable isotopic analysis of thermal waters in the Bruneau area by Young and Lewis (1982) "* * * indicates that none of the hot water discharged from the geothermal system is derived from present-day, local precipitation." They go on to state that resident time calculated on the basis of reservoir (=aquifer) volume and discharge "* * * is probably at least 3,400–6,800 years, and in view of recent carbon-14 analysis, perhaps as long as 25,000 years." One additional side-effect of protracted drought conditions is the increased reliance (=pumpage) on ground water for irrigated agriculture to offset lack of surface water supplies. Regardless of cause, if water-levels in the geothermal aquifer continue to decline, the Service believes all thermal springflows containing Bruneau Hot Springsnails will eventually cease to flow and their habitat will be eliminated.

Issue 3. Some commenters stated that the Bruneau Hot Springsnail is prolific and has "* * * the ability to reproduce at a level that is remarkable with an increase in nine months of several hundred fold", therefore "* * * it does not appear that the snail is endangered, but that the hot springs in which it exists is endangered." They believe the Service should concentrate on "positive" (alternative) measures such as maintaining captive populations or transplanting snails to other springs, rather than listing.

Service Response. Under the Act, a species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1). Factor A includes "The present or threatened destruction, modification, or curtailment of its habitat or range." Absolute population numbers, total number of extant populations, or the ability to rapidly reproduce are less important to a species' long-term survival if its remaining habitat is threatened and cannot be preserved. In addition, according to section 2(b) of the Act, "* * * the purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved". Once a species becomes listed as threatened or endangered, section 4(f) of the Act directs the Service to develop and implement recovery plans for that species. Recovery is the process by which the deadline of a listed species is arrested or reversed, and threats to its survival are eliminated or neutralized. Two goals of this process are: (1) The maintenance of secure, self-sustaining wild populations of species with the minimum necessary investment of resources, and (2) to restore listed species to a point where they are viable self-sustaining components of their ecosystems, so as to allow 'delisting' (U.S. Fish and Wildlife Service 1990). While the Service recognizes that captive propagation and transplantation can be valid conservation tools and assist in recovery, in the case of the Bruneau Hot Springsnail, these measures would not contribute to "maintenance of secure, self-sustaining" populations. Even if successful transplantion could be achieved, unless measures are taken to reverse the trend of declining thermal spring discharges throughout the Bruneau area, transplanted populations would eventually be subject to the same threats as existing springsnail populations and their habitats.

Issue 4. The Idaho Water Users Association, Inc. maintains that the conservation of the Bruneau Hot Springsnail should be addressed through other existing regulatory mechanisms and not through the listing process. Because "* * * none of the agencies have asked for any specific regulatory consideration for the (Bruneau) area" there may be opportunities to remedy any threats to the Bruneau Hot Springsnail outside of the Act. For example, they believe the Bureau of Land Management (Bureau) should manage the snail's habitat as an Area of Critical Environmental Concern (ACEC).

Service Response: The Service acknowledges that designating an ACEC for the species on Bureau lands would recognize the unique attributes of the springsnail and its habitats. Although this designation might result in increased protection for springsnail habitats from cattle grazing on public lands, such recognition would not and could not address the primary threat to the survival of the species, which is further habitat loss due to ground water withdrawal from adjacent private lands. In any event, ACEC designations are within the purview of the Bureau and not the Service. To date, the Bureau has not considered an ACEC designation for Bureau lands associated with the Bruneau Hot Springsnail (Fred Minckler, Bureau, Boise, pers. comm.). The Idaho Department of Water Resources (IDWR) regulates ground water development in the Bruneau area. In 1982, the IDWR established the Bruneau-Grandview Ground Water Management Area (GWMA), an administrative tool which allows the

IDWR to continue to receive and retain without action applications for water permits until it can be demonstrated that sufficient water is available and the withdrawal will not adversely impact other water rights within the Bruneau area (IDWR 1992). Due to declining water levels and pressures in the area, none of the 17 applications for withdrawal within the GWMA, except those for domestic purposes, have been approved since the area was designated. Therefore, while IDWR can limit the development of new wells from the regional geothermal aquifer system, impose water conservation measures, and require meters on existing wells, IDWR possesses no authority under existing Idaho State Law to shut down existing wells for the sole purpose of protection and recovery of the springsnail. See the discussion under Factor D in "Summary of Factors Affecting the Species" for a complete discussion on the inadequacy of existing regulatory mechanisms for the Bruneau Hot Springsnail.

Issue 5. One commenter requested that the Service prepare an environmental assessment or environmental impact statement under the National Environmental Policy Act (NEPA) for the proposed listing action. It was also requested that the assessment should include a determination of the geographic area which might be affected by any potential restrictions on future ground water development and withdrawal.

Service Response: As discussed in the NEPA section of this rule, it has been determined that such analyses are not required in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

Issue 6. Several commenters were concerned with the impacts to agriculture that would result from listing and the potential designation of critical habitat for the Bruneau Hot Springsnail. They requested the Service to designate critical habitat during the final rulemaking process so that potential economic impacts could be evaluated.

Service Response: Under section 4(a)(3)(A) of the Act, the Secretary may designate critical habitat to the maximum extent prudent and determinable at the time a species is determined to be threatened or endangered. Critical habitat is not a management plan, but a legally described list of those areas considered essential for the conservation of the species. In the proposed rule, the Service found that determination of critical habitat was not prudent for the Bruneau Hot Springsnail. As discussed under the "Critical Habitat" section below, the Service continues to find that designation of critical habitat for the Bruneau Hot Springsnail is not prudent at this time. Because many of the remaining populations of this species are in accessible, localized springs on public land, such designation might increase the degree of vandalism, collecting, and other human activities. Protection of this species' habitat will be addressed through the recovery process. It should be noted that a designation of critical habitat does not create a wildlife refuge or wilderness area, nor does it close the area to human activity. It applies only to Federal agencies which propose to fund, authorize, or carry out activities that may destroy or adversely modify areas within designated critical habitat. Although critical habitat may be designated on private or State lands, activities on these lands would not be restricted by a designation unless a Federal permit or other Federal involvement is present.

Issue 7. Many comment letters were received expressing concerns with the potential economic impacts to existing and future agricultural development in the Bruneau River Basin. They suggested that the Service prepare an economic analysis prior to any listing decision.

Service Response: Under section 4(b)(1)(A) of the Act, the listing process is based solely on the best scientific and commercial information available and economic considerations are not applicable. The legislative history of the Act clearly states the intent of Congress to "ensure" that listing decisions are "based solely upon biological criteria and to prevent non-biological considerations from affecting such decisions." H.R. Rep. No. 97–835, 97th Congress 2nd Session 19 (1982). Because the Service is specifically precluded from considering economic impacts in the listing process, the Service has not addressed such impacts in this final rule. Economic factors are considered in a designation of critical habitat and during the development of a recovery plan.

Issue 8. Several commenters questioned whether the Bruneau Hot Springsnail is endemic or indigenous to the area. They stated that tropical fish have been introduced into several of the thermal springs in the Bruneau basin as far back as prior to the 1940's, therefore, the snail may also have been introduced along with the fish.

Service Response: The Service has considered available scientific evidence and concludes that the Bruneau Hot Springsnail is endemic to southwestern Idaho. Hershler, in his 1990 description of the species, stated that "* * * *Pyrgulopsis bruneauensis* appears closest morphologically to *P. amargosae* from the Death Valley System to the south * * *", although the species is also biogeographically similar to other regional *Pyrgulopsis*. Hershler also believes that local endemism of the springsnail appears likely. Additionally, there are no historic records for the springsnail from the U.S. or elsewhere, and a helicopter survey of several thermal springs in the Bruneau and Jarbridge River Basins in southwest Idaho and the Owyhee River in southeastern Oregon conducted during January, 1987, did not reveal additional populations. If at some future time the species is found to be more widespread than previously thought, and threats to its continued existence are removed, the Service would consider downlisting or delisting the species.

In summary, although recent studies have noted additional thermal springflows containing Bruneau Hot Springsnails, no substantive comments were received indicating that the species is found outside of the Bruneau River Basin near Hot Creek or under a lesser degree of threat than originally thought. Opposing comments were based primarily upon concerns that listing of the springsnail would affect the allocation of water and impact agricultural development in the Bruneau Valley, rather than information concerning the species' status. Some opposing comments questioned the adequacy of the Service's data. The Service has continued to gather information regarding the status of the species since publication of the proposed rule in 1985 and believes that this final rule is thorough and appropriate. As discussed in detail in the "Summary of Factors Affecting the Species" section, the Service concludes that nearly all of the remaining populations of the Bruneau Hot Springsnail are at risk.

Summary of Factors Affecting the Species

After a thorough review and consideration of all information available, the Service has determined that the Bruneau Hot Springsnail should be classified as an endangered species. Procedures found at section 4 of the Act (16 U.S.C. 1533) and regulations (50 CFR part 424) promulgated to implement the listing provisions of the Act were followed. Under the Act, a

species may be determined to be endangered or threatened due to one or more of the five factors described in section 4(a)(1). These factors and their application to the Bruneau Hot Springsnail (*Pyrgulopsis bruneauensis*) are as follows:

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

Activities that threaten the continued existence of the Bruneau Hot Springsnail include further agricultural-related ground water withdrawal and livestock grazing.

Ground water withdrawal and pumping threaten the springsnail through a reduction or loss of thermal spring habitats from depletion of the geothermal aquifer underlaying the Bruneau area. Within the past 25 years, discharge from many of the thermal springs along Hot Creek have decreased, thus restricting the springsnails' habitat area (Berenbrock, USGS, written communication; Young et al. 1979). This is specially true for the Indian Bathtub springs, where the species was first discovered, and where springflows have now ceased and the springsnail has been eliminated. Spring discharge in 1964 was almost 2,400 gpm and had declined by the summer of 1990 to zero discharge. Beginning in the late 1890's, when ground water development for domestic and agricultural purposes began in the Bruneau area, through 1991, an estimated 275,000 acre-feet of thermal water was discharged from Indian Bathtub springs (Berenbrock, USGS, written communication). Of this amount, only 1,400 acre-feet was discharged from the spring during 1981 to 1991. The decline in discharge from the Indian Bathtub springs was noted beginning in the mid-1960's and coincided with the accelerated increase in ground water withdrawal associated with a rapid increase in the amount of lands irrigated with ground water throughout the Bruneau area. As recently as 1991, the USGS estimated that ground water withdrawals exceeded the estimated historic rate of natural recharge by about 12,000 acre-feet (Berenbrock, USGS, written communication). It should be noted that ground water withdrawals have actually declined over the past 10 years, primarily due to cropland retired from production through participation in the Conservation Reserve Program (CRP). Yet water levels in the geothermal aquifer continue to decline. The Service is concerned that the number of withdrawals may again increase in the next few years as croplands will again enter production when the current 10 year CRP program expires and/or is not renewed. In any event, if present water management practices continue, water levels in the aquifer will either continue to decline or eventually stabilize at some lower level. The decline in spring flows has been documented at the Indian Bathtub in upper Hot Creek and at least two additional springs (Berenbrock, USGS, written communication); however, springflow data has not been collected in the remaining 125 springs containing springsnails, most of which are at elevations lower than the Indian Bathtub springs. If ground water levels in the geothermal aquifer continue to decline, the Service anticipates that all remaining thermal spring habitats containing Bruneau Hot Springsnails will eventually cease to flow, causing the extinction of the species.

Cattle grazing also impacts springsnail habitats, especially those along Hot Creek. Although approximately 160 acres along Hot Creek canyon was fenced in 1990 to protect it from livestock, trespassing cattle have been observed grazing within the enclosure on several occasions since 1990 (Mladenka 1992). The cattle have trampled instream substrates and habitats causing direct springsnail mortality and displacement. For example, Mladenka noted in his study the lowest abundance estimates of springsnails at one monitoring site occurred on the same date that several hundred cattle were observed in the vicinity of the stream site. Cattle also browse and remove riparian vegetation that shades Hot Creek, allowing temperatures to reach levels affecting reproduction or possibly lethal to the species. Additionally, livestock grazing in the adjacent watershed, combined with ongoing drought conditions, has basically denuded soils and vegetation to such an extent that periodic flash floods now dump sediment into Hot Creek that has covered over and totally eliminated springsnail seep/spring habitats for almost 150 m (492 ft).

Recreational access may also be impacting habitats of the Bruneau Hot Springsnail along the Bruneau River. Makeshift dams are sometimes constructed by bathers to form thermal pools and improve conditions for bathing. Construction of these pools impacts springsnails through habitat modification as rock substrates are moved, flow is altered and sediments are trapped. These pools also alter and possibly destroy the madicolous algal habitats preferred by the springsnail as pool water levels are raised.

In summary, the cumulative effects of these factors continue to threaten the increasingly fragmented populations of the Bruneau Hot Springsnail and their thermal habitats

B. Overutilization for Commercial Recreational, Scientific, or Educational Purposes

There are no known commercial uses for this species. Recreational use of the thermal springs and outflows, except as described in Factor A above for bathing, is not considered a significant threat. However, since whitewater boating is increasing on the Bruneau River adjacent to these thermal outflows, recreational bathing activities may have to be more closely regulated in the future. Other mollusc species have become vulnerable to unauthorized collection for scientific purposes following listing. Because the distribution of the Bruneau Hot Springsnail is restricted and generally well known, overcollection is a potential threat to the species.

C. Disease or Predation

Juvenile springsnails appear vulnerable to a variety of predators (Mladenka 1992). Damselflies (Zygoptera) and dragonflies (Anisoptera) were observed feeding upon snails in the wild. The presence of a large population of introduced guppies in Hot Creek and several of the other small thermal springs downstream along the west bank of the Bruneau River has been suggested as potentially threatening the springsnail. Mladenka (1992) observed guppies feeding upon snails in the laboratory. In addition to guppies, a species of *Tilapia* has ascended into and reproduced in Hot Creek (Bowler 1992). The presence of this new exotic predator may also constitute a threat to the Bruneau Hot Springsnail. It should be noted that madicolous habitats support neither of these two exotic fishes or dragonflies, but do harbor numerous damselflies.

D. The Inadequacy of Existing Regulatory Mechanisms

At least three State agencies in Idaho have as part of their goals and objectives the identification and protection of rare taxa and their habitats. The Idaho Department of Parks and Recreation has authority under Idaho Code Section 18–3913, 1967, to protect only plants, with animals not given special protection on Idaho lands. The Department of Fish and Game, under Idaho Code Section 36–103, is mandated to preserve, protect, perpetuate, and manage all wildlife. However, these mandates do not extend protection to invertebrate species.

The Idaho Department of Water Resources (IDWR) regulates water development in the Bruneau area. It is the policy of IDWR to regulate and conserve ground water resources from depletion or 'mining'. In *Baker* v. *Ore-Ida Foods, Inc* 95 Idaho 575 (1973), it was established that "* * * where continued withdrawal of the aquifer results in mining, the withdrawal would violate the Ground Water Act." However, any conservation measures imposed by IDWR to manage ground water 'mining' are only for the purpose of fulfilling senior water rights and not for the protection of fish and wildlife. At present, there is no specific allocation of either surface or ground water in the Bruneau area for the protection and conservation of fish and wildlife. In 1982, the IDWR established the Bruneau-Grandview Ground Water Management Area (GWMA) pursuant to provisions of Idaho Code Section 42–233a "* * * to identify the area as approaching the conditions of a critical ground water area" (IDWR 1992). This GWMA designation has allowed the IDWR to continue to receive and hold without action applications for water permits until it can be demonstrated that the proposed withdrawal will not adversely impact other water rights in the GWMA. Due to the continued decline in water levels in the geothermal aquifer, none of the 17 applications for withdrawal within the GWMA submitted since 1982, except those for domestic purposes, have been approved. Without recovery of water levels, IDWR does not anticipate modification of the GWMA designation any time soon. In any event, GWMA designations are intended only to maintain sufficient ground water to fulfill existing water rights and supply the needs of irrigation, and not for the protection and conservation of fish and wildlife.

The Bruneau area is located entirely within the area of an ongoing water rights adjudication (Snake River Basin Adjudication). Through a Director's Report from IDWR due in 1994, the adjudication will clarify existing water rights and water uses and will permit IDWR to eliminate water rights that are of record but are no longer utilized. The IDWR also believes the adjudication process will need to be completed prior to the development and implementation of ground water conservation measures on behalf of the springsnail that may affect existing water rights and uses since "without completing this adjudication process there is no effective way to determine the existence or validity of water rights to serve as the basis for delivery".

Under the Idaho Ground Water Act, IDWR also regulates the construction and maintenance of geothermal (Idaho Code Section 42–238(4)) and artesian (Idaho Code Sections 42–1601 & 42–1603) wells so that they operate to conserve ground water resources and prevent unnecessary flow and waste. The IDWR in 1990 identified several artesian wells in the Bruneau area "* * * leaking water at land surface or potentially wasting water in the subsurface due to inappropriate well construction techniques" (IDWR 1992). To date no action has been taken to have these leaking wells rehabilitated so that the aquifer pressures can be preserved or increased.

In summary, the IDWR has authority to control ground water 'mining' and can limit the development of new wells in a critical ground water area, impose water conservation measures, and also require meters on existing wells. However, IDWR has stated that "* * * the Director has no authority under State law to shut down prior vested water rights in order to protect an endangered species" (IDWR 1992); or in this instance for the sole purpose of protection and recovery of habitats for the Bruneau Hot Springsnail.

The Bureau of Land Management (Bureau) manages all of the public lands containing springsnails and their habitats along Hot Creek and the Bruneau River. The Bureau issues permits for livestock grazing on these lands and grants authorizations that would lead to the drilling of new wells or increased ground water use on Bureau lands. In the past, the Bureau has shown an interest in conserving the species and has solicited input from the Service regarding impacts that may result from any proposed activities. However, the Service's comments regarding candidate species are advisory in nature. The Bureau has developed a Cooperative Agreement to fence and regulate livestock use along Hot Creek, but has not taken steps to impose additional conservation measures to protect remaining springsnail habitats on Bureau lands.

With this listing of the Bruneau Hot Springsnail, the Bureau is required to initiate consultation pursuant to section 7 of the Act on any Bureau activity or project that may affect the species. Formal consultation would result in a Biological Opinion on whether or not the activity proposed to be authorized is likely to jeopardize the continued existence of the species. With listing, the Bureau is required to insure that any activity or project they authorize would not be likely to jeopardize the continued existence of the springsnail. Conditions that would provide protection to the springsnail and their habitats could be incorporated into permits issued or authorizations granted. The provisions of section 7 of the Act are more fully discussed later in this rule.

E. Other Natural or Manmade Factors Affecting Its Continued Existence

Flash flood sedimentation of springsnail habitats is a threat to this speices. Recent summer floods and mudflows during 1991 and 1992 delivered significant amounts of sand, silt and gravel to upper Hot Creek, and as of July 1992, the Indian Bathtub was completely filled with sediment (Robinson et al. 1992). Based on comparisons made with historical photographs, a meter or more of the seep/rockface springsnail habitats in the Bathtub had been covered. Following sediment delivery from an even more recent flash flood event during late October 1992, additional springflows have been completely covered over and springsnail habitat eliminated from approximately 150m (492 ft) in upper Hot Creek below the Indian Bathtub (Committee for Idaho's High Desert 1992). While flash floods probably occurred historically, the effects of declining springflows coupled with drought conditions have resulted in the permanent elimination of springflows and filling in of spingsnail habitats at the Indian Bathtub and upper Hot Creek. Additionally, livestock grazing, compounded by protracted drought conditions in southwestern Idaho, has basically denuded soils and vegetation in the upper Hot Creek watershed to such an extent that periodic flash floods deliver sediment that cannot be flushed by the remaining weak and declining springflows. Measures to protect springsnail spring/seep habitats in the Indian Bathtub and Hot Creek from the effects of flash flooding were proposed by the Bureau of Land Management years ago but never implemented. These measures included the construction of small retention dams in the Hot Creek watershed to trap runoff sediment while still maintaining thermal seep habitats.

As mentioned in Factor A, cattle graze and trample the habitat along Hot Creek. Trampling also occurs instream, causing direct Bruneau Hot Springsnail mortality.

Determination

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by the Bruneau Hot Springsnail in determining

to issue this rule. Based on this evaluation, the preferred action is to list the Bruneau Hot Springsnail as endangered. Today the species persists in a few isolated thermal springs and seeps in Hot Creek and along an 8.5 km (5.28 miles) reach of the Bruneau River characterized by temperatures ranging from 15 to 35° C. Most of these sites are no more than small seeps less than 1 square m in size separated by distances less than 1 m (3.28 ft) to greater than 2,000 m (6,562 ft). The free-flowing thermal spring and seep environments required by the Bruneau Hot Springsnail have been impacted by and are vulnerable to continued reduction from agricultural-related ground water withdrawal/pumping. The species and its habitat are also vulnerable to habitat modification from the effects of livestock grazing, recreational access and flash floods. The remaining complex of thermally related springs and their immediate outflows are not protected from the potential threats previously discussed. Existing regulations do not provide adequate protection to prevent further direct or indirect habitat losses.

Because the Bruneau Hot Springsnail is in danger of extinction throughout all or a significant portion of its range, the species fits the definition of endangered as defined in the Act. For reasons discussed below, critical habitat is not being designated at this time.

Critical Habitat

Section 4(a)(3) of the Act, as amended, requires that to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time a species is determined to be endangered or threatened. The Service has determined that critical habitat designation for this species is not prudent at this time. Remaining populations are restricted to a small geographic area along the Bruneau River in southwestern Idaho and vandalism could occur if their whereabouts were widely known. Regulations implementing section 4 of the Act provide that a designation of critical habitat is not prudent when a species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat (50 CFR 424.12). Publication of critical habitat descriptions would make this species even more vulnerable to such acts and increase enforcement problems.

Protection of this species' habitat will be addressed through the recovery process and through the jeopardy standard of the section 7 consultation process. The Service believes that Federal involvement in the areas where Bruneau Hot Springsnails persist can be identified without the designation of critical habitat. In addition, all private land owners will be notified concerning this species' habitat and the importance of protecting it. Therefore, it would not now be prudent to determine critical habitat for the Bruneau Hot Springsnail.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain activities. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. Such actions may be initiated following listing. The protection required of Federal agencies and the prohibitions against taking and harm are discussed, in part, below.

Section 7(a) of the act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a proposed threatened or endangered species or result in destruction or adverse modification of proposed critical habitat. If a species is subsequently listed, section 7(a)(2) requires Federal agencies to insure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

The Bureau of Land Management (Bureau) is the Federal agency that is most likely to be affected by this rule. Changes in management on Bureau lands containing springsnail habitats would be subject to consultation with the Service. Bureau actions that may be affected by this proposal include the issuance of livestock grazing permits and granting authorizations that would lead to drilling of new wells or increase ground water use. The Department of Agriculture (Department) may be required to consult with the Service on any of the following actions: An APHIS spraying program (for grasshopper and other insect control) proposed for the Bruneau-Grandview area; Department subsidized agricultural conservation or best management practices (BMP) program; and all agricultural crop subsidy programs. Other Federal or federally assisted programs affecting Federal direct loan and grant programs, loan guarantee programs, home and mortgage assistance and capital improvement loan programs, including annual operating loans of the Farmers Home Administration, would also be subject to the provisions of section 7.

The Act and implementing regulations found at 50 CFR 17.21 set forth a series of general prohibitions and exceptions that apply to all endangered wildlife. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to take (including harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect; or attempt any such conduct) import or export, transport in interstate or foreign commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any listed species. It also is illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

Permits may be issued to carry out otherwise prohibited activities involving endangered wildlife species under certain circumstances. Regulations governing permits are at 50 CFR 17.22 and 17.23. Such permits are available for scientific purposes, to enhance the propagation or survival of the species, and/or for incidental take in connection with otherwise lawful activities. In some instances, permits may be issued during a specified period of time to relieve undue economic hardship that would be suffered if such relief were not available.

Requests for copies of the regulations on listed wildlife and inquiries regarding them may be addressed to the Office of Management Authority, U.S. Fish Wildlife Service, room 432, 4401 North Fairfax Drive, Arlington, VA 22203–3507 (703/358–2104).

National Environmental Policy Act

The Fish and Wildlife Service has determined that an Environmental Assessment, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations

adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

Berenbrock, C. 1992. Effects of well discharges on hydraulic heads in and spring discharges from the geothermal aquifer system in the Bruneau area, Owyhee County, Southwestern Idaho. Water Resources Investigations, U.S. Geological Survey. Preliminary Report (written communication).

Bowler, P.A. 1992. Letter dated November 3, 1992 to the Boise Field Office containing information on the listing proposal. 3 pp.

Bowler, P.A., and P. Olmstead. 1991. The current status of the Bruneau Hot Springs snail, an undescribed monotypic genus of freshwater hydrobiid snail, and its declining habitat. Proceedings of the Desert Fishes Council, Volumes XXI. pp. 195–207.

Committee for Idaho's High Desert. Letter dated November 3, 1992 to the Boise Field Office containing information and photographs concerning changing habitat conditions in the Indian Bathtub/Hot Creek area. 3 pp with photographs.

Hershler, R. H. 1990. *Pyrgulopsis bruneauensis*, a new springsnail (Gastropoda: Hydrobiidae) from the Snake River Plan, Southern Idaho. Proceedings of the Biological Society of Washington. 103(4): 803–814.

Idaho Department of Water Resources. 1992. Analysis of management alternatives and potential impacts on ground-water development due to proposed endangered species classification of the Bruneau Hot Springs Snail. Final Report to U.S. Fish & Wildlife Service. 145 pp.

Mladenka, G.C. 1992. The ecological life history of the Bruneau Hot Springs Snail (*Pyrgulopsis bruneauensis*). Stream Ecology Center, Department of Biological Sciences, Idaho State University, Pocatello, Idaho. Final Report to the U.S. Fish & Wildlife Service, Boise Field Office. 116 pp.

Robinson, C.T., G.W. Minshall, and K. Sant. 1992. Bruneau Hot Springs Snail. Annual Monitoring Report to Bureau of Land Management. 17 pp.

Taylor, D.W. 1982. Status review on Bruneau Hot Spring Snail. Unpublished report submitted to the U.S. Fish and Wildlife Service's Boise Endangered Species Field Office.

U.S. Fish & Wildlife Service. 1990. Policy and guidelines for planning and coordinating recovery of endangered and threatened species. Service Document, May 1990.

Young, H.W. and R.E. Lewis. 1982. Hydrology and geochemistry of thermal ground water in southwestern Idaho and North-Central Nevada, U.S. Geological Survey Professional Paper 1044–J. 20 pp.

Young, H.W., R.E. Lewis, and R. L. Backsen. 1979. Thermal groundwater discharge and associated convective heat flux, Bruneau-Grandview area, southwest Idaho. U.S. Geological Survey Water-Resources Investigations 79–62, Open File Report.

Author

The primary author of this rule is Stephen D. Duke, Boise Field Office, U.S. Fish and Wildlife Service, 4696 Overland Road, room 576, Boise, Idaho (208/334/1931).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

Regulation Promulgation

PART 17—[AMENDED]

Accordingly, part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, is amended as set forth below:

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. Amend § 17.11(h) by adding the following, in alphabetical order, under SNAILS, to the List of Endangered and Threatened Wildlife:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	
Snails							
*	*	*	*	*	*	*	
Springsnail, Bruneau Hot	*Pyrgulopsis bruneauensis.*	U.S.A. (ID)	NA	E	489	NA	NA
*	*	*	*	*	*	*	

Dated: January 13, 1993.

Bruce Blanchard,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 93–1605 Filed 1–22–93; 8:45 am]

BILLING CODE 4310–55–M

Proposed Rules

Federal Register
Vol. 58, No. 14
Monday, January 25, 1993

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Chapter I

[Summary Notice No. PR–93–1]

Petition for Rulemaking; Summary of Petitions Received; Dispositions of Petitions Issued

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for rulemaking received and of dispositions of prior petitions.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for rulemaking (14 CFR part 11), this notice contains a summary of certain petitions requesting the initiation of rulemaking procedures for the amendment of specified provisions of the Federal Aviation Regulations and of denials or withdrawals of certain petitions previously received. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATES: Comments on petitions received must identify the petition docket number involved and must be received March 26, 1993.

ADDRESSES: Send comments on any petition in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket No. _____, 800 Independence Avenue, SW., Washington, DC 20591

The petition, any comments received, and a copy of any final disposition are filed in the assigned regulatory docket and are available for examination in the Rules Docket (AGC–10), room 915G, FAA Headquarters Building (FOB 10A), 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–3132

FOR FURTHER INFORMATION CONTACT: D. Michael Smith, Office of Rulemaking (ARM–1), Federal Aviation Administration, 800 Independence Avenue, SW, Washington, DC 20591; telephone (202) 267–7470.

This notice is published pursuant to paragraphs (b) and (f) of § 11.27 of part 11 of the Federal Aviation Regulations (14 CFR part 11).

Issued in Washington, DC on January 15, 1993.

Donald P. Byrne,

Assistant Chief Counsel for Regulations.

Petitions for Rulemaking

Docket No. 27044.

Petitioner: Mr. John E. Gillick,

Regulations Affected: 14 CFR 93.123(c). Description of Rulechange Sought: To authorize airlines to use commuter slots at LaGuardia International Airport and Washington National Airport to operate aircraft certificated with a maximum passenger seating capacity of up to 80 passengers. Petitioners Reason for the Request: The FAA has amended the High Density Traffic Airports Rule as it applies to operations at O'Hare International Airport, and this petition seeks similar treatment for LaGuardia and Washington National so aircraft with up to 80 seats would be permitted to use commuter air carrier slots to provide quiet, efficient jet service with new technology, State-3 aircraft.

[FR Doc. 93–1670 Filed 1–22–93; 8:45 am]

BILLING CODE 4910–13–M

14 CFR Part 39

[Docket No. 92–NM–101–AD]

Airworthiness Directives; Airbus Industrie Model A310 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Supplemental notice of proposed rulemaking; reopening of comment period.

SUMMARY: This document revises an earlier proposed airworthiness directive (AD), applicable to certain Airbus Industrie Model A310 series airplanes, that would have required conducting an integrity test to detect corrosion in the wing tip brake solenoids, and replacement of corroded solenoids, if necessary. That proposal was prompted by several incidents in which wing tip brake solenoids failed as a result of corrosion in the solenoid coils. This action revises the proposed rule by adding a requirement for repetitive integrity tests of the wing tip brake solenoids until all 8 solenoids have been replaced with modified ones. This action also revises the applicability of the proposed rule by including additional airplanes. The actions specified by this proposed AD are intended to prevent wing tip brake valve failure, which could lead to reduced controllability of the airplane.

DATES: Comments must be received by March 3, 1993.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 92–NM–101–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Airbus Industrie, Airbus Support Division, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Greg Holt, Aerospace Engineer, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (206) 227–2140; fax (206) 227–1320.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.